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No. 22,494

IN THE

MAY 10 1968

United States Court of Appeals

For the Ninth Circuit

M. ASHLEY DICKERSON,

Appellant,

vs.

LEWIS J. CONRAD, District Director,
Internal Revenue and CHARLES A.
POHLAND, Internal Revenue Agent,
Appellees.

3483

v 3483

On Appeal from the Judgment of the United States
District Court for the District of Alaska

BRIEF FOR THE APPELLEES

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No. 22,494

IN THE

**United States Court of Appeals
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M. ASHLEY DICKERSON,

Appellant,

VS.

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POHLAND, Internal Revenue Agent,
Appellees.

**On Appeal from the Judgment of the United States
District Court for the District of Alaska**

BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court's opinion (I-R. 76-78) has not yet been officially reported.

JURISDICTION

Taxpayer's complaint was filed on September 13, 1967. (I-R. 1.) The Government's motion to dismiss was filed on September 28, 1967 (I-R. 30), and was granted by the court's judgment of dismissal entered

on November 13, 1967 (I-R. 79). Notice of appeal was filed on November 17, 1967. (I-R. 80.) This Court's jurisdiction is based on 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether, prior to issuance of an Internal Revenue summons, a taxpayer can successfully maintain an action to enjoin Internal Revenue Service officials from requesting the taxpayer to furnish information and to allow inspection of his records in the course of investigating the taxpayer's correct tax liability.

2. Whether the District Court had jurisdiction to grant taxpayer's prayer that appellees be enjoined from conducting an investigation of the accuracy of her tax returns.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN
ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

(26 U.S.C. 1964 ed., Sec. 7421.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1964 ed., Sec. 7602.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of section

7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602 the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1964 ed., Sec. 7605.)

28 U.S.C.:

§ 1340. *Internal revenue; customs duties*

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 2201. [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration

shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Taxpayer's complaint (I-R. 1-6) alleged that the action arose under the Fourth and Fifth Amendments to the Constitution, under 28 U.S.C., Section 1340, and under certain sections of the Internal Revenue Code of 1954, namely, Sections 6510(c)(1) and (2),¹ 7602, and 7605(d).²

Taxpayer alleged "a conspiracy between the Defendants and other parties unknown to Plaintiff"³ to harass taxpayer with accusations of "improper filing of her taxes." (I-R. 1-2, par. III.) The complaint further alleges that taxpayer was required to re-file a Form 941 (I-R. 2, par. IV) and that she paid an additional tax on an amended return (I-R. 3, par. VII) the nature of which is not particularly stated. Paragraph VIII (I-R. 3) alleged that the sole aim of the appellees in this harassment "is for the purpose of bringing a criminal prosecution against Plaintiff, and making Plaintiff incriminate herself in violation of her rights under the Fifth Amendment," and "to

¹Section 6501, relating to limitations on assessment, was evidently the intended reference.

²Section 7605(b), relating to unnecessary examinations, was evidently the intended reference.

³In her brief (p. 6) taxpayer names members of the Grievance Committee as persons engaged in a concerted action to destroy her practice and convict her of crime.

force Plaintiff to violate the attorney-client privilege.” Taxpayer also alleged in Paragraph VIII that the agents “have threatened that if Plaintiff did not voluntarily give them this information, that they would force her to give it to them through the issuance of subpoenas.” (I-R. 3-4.)

The nature of the stated harassment was alleged in Paragraph IV as the acts of “certain revenue agents” in coming to taxpayer’s office for copies of Form 941, and in later paragraphs as coming to her office “to try to coerce her into applying * * * [a] fee to a tax liability of another person” (par. V), calling her office “demanding certain records” and waivers (par. VI), and “trespassing on her premises despite the fact that she has asked them not to come.” (par. VII). (I-R. 2-3.)

The complaint alleged that taxpayer feared that the agents “will thus violate her constitutional rights under the Fourth Amendment, etc.” (I-R. 4, par. VIII.)

Taxpayer identified herself as a female and a Negro. (I-R. 1, 4, pars. II, VIII.)

The following relief was demanded (I-R. 5):

WHEREFORE, Plaintiff prays that an injunction issue from this Court enjoining the Defendants from further molesting, harassing or intimidating Plaintiff, or demanding any records from her, or forcing her in any way to assist them in the preparation of a criminal charge against her, or coming about her premises for any purpose, at any time.

A motion for a preliminary injunction (I-R. 7) accompanied the complaint and on September 26, 1967, taxpayer filed a memorandum in support thereof (I-R. 21-25). This memorandum alleged that the appellees had made a "request to be allowed to 'quarter' themselves in Plaintiff's very small office seizing any record they so desire." (I-R. 21.) Attachments to the memorandum consisted of communications from taxpayer to the District Director requesting an extension of time to file her 1966 return (I-R. 26, 28) and communications from the District Director to taxpayer dated April 11, 1967 (I-R. 27), and September 8, 1967 (I-R. 29). The letter of April 11, 1967 (I-R. 27), referred to a prior phone conversation and outlined information which the taxpayer was to supply by July 10, 1967. The requested data related, inter alia, to "bunched income" and "regular fees," and requested information as to the names of clients and services performed. The District Director's letter of September 8, 1967 (I-R. 29), stated that taxpayer's 1964, 1965 and 1966 returns had been selected for examination and that Revenue Agent Pohland would be at taxpayer's place of business at a certain fixed time to examine taxpayer's books and records relating to those years. Taxpayer was requested to call Agent Pohland if the time and place specified for the examination were not satisfactory.

The appellees filed a motion to dismiss (I-R. 30-31) and in opposition thereto taxpayer filed an affidavit which, in addition to enlarging on allegations of animosity toward her, alleged (I-R. 55):

My name is M. ASHLEY DICKERSON and I am the plaintiff in this suit. I have paid all taxes due, or claimed to be due, from me by the United States. At no time has any tax demand been made of me of any sum in addition to what I have already paid. My suit on file here is not one to enjoin the United States from collection or assessment of a tax. I would welcome their giving me the benefit of the law and serving on me a written demand for any tax which they claim I owe as in that case. I would then have the right of appeal to the Tax Court of the United States.

SUMMARY OF ARGUMENT

Taxpayer made no showing of oppressive conduct or of acts by the Internal Revenue Service officials in excess of their statutory duty and authority to determine taxpayer's correct tax liability. She is free to refuse their inquiries and requests and will have an adequate remedy at law in the event the appellees issue an Internal Revenue summons and apply to the District Court for enforcement. In the absence of a substantial controversy as to the appellees' authority to investigate taxpayer's correct tax liability, the District Court has no jurisdiction of an action to enjoin the Internal Revenue Service officials from their investigation.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DISMISSED TAXPAYER'S COMPLAINT BECAUSE IT STATED NO CAUSE OF ACTION WARRANTING AN INJUNCTION

Having sifted taxpayer's allegations, the District Court's opinion reduced the controversy to the following elements (I-R. 77-78):

It is apparent from the record that the Secretary, through the District Director, has attempted to exercise the investigatory power given him under Section 7602, and that the plaintiff has declined to respond. The District Director, if he desires to pursue the matter, must issue a summons to plaintiff as provided by statute. Plaintiff then may challenge the summons on any basis available to her. If the challenge is there rejected and compliance still refused, the District Director is empowered to enforce the writ in the district court under Section 7402(b).⁴

Therefore, this action is neither timely nor plaintiff's proper remedy. If she wishes to challenge the investigation of her tax returns on any of the grounds or for any of the reasons alleged in her complaint, she must follow the correct procedural steps. She is afforded "complete protection" if and when a summons issues, compliance is refused, and the summons is sought to be enforced.⁵

⁴*Reisman v. Caplin*, 375 U.S. 440, 446 (1964); *Accord, Kennedy v. Coyle*, 352 F. 2d 867 (7th Cir. 1965); *Lesser v. United States*, 230 F. Supp. 817 (E.D. N.Y. 1964).

⁵See *United States v. Powell*, 379 U.S. 48 (1964); *Reisman v. Caplin*, *supra*; *Kennedy v. Coyle*, *supra*; *Zamaroni v. Philpott*, 346 F. 2d 365 (7th Cir.), *cert. denied*, 382 U.S. 903 (1963); *Mag-*

Taxpayer shows no intrusion on her privacy which she cannot control by withholding consent. The alleged "quartering" of agents on her premises is shown to be nothing but a tentative appointment for an agent to examine taxpayer's records in her own office, with an invitation to taxpayer to suggest an alternative time and place. To what extent she may lawfully resist an Internal Revenue summons must await the event of the issuance thereof. Taxpayer has supplied no allegations and specified no statute which indicates that appellees might lack authority to determine her tax liability for the years in question.

The trial court's disposition seems inescapable in view of *Reisman v. Caplin*, 375 U.S. 440, 446, which held that a taxpayer has an adequate remedy by virtue of his right to invoke judicial review of the Commissioner's demands when the latter applies to the District Court for an order enforcing an Internal Revenue summons. Other cases emphasizing the taxpayer's adequate remedy at law are *Kennedy v. Coyle*, 352 F. 2d 867 (C.A. 7th), and *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5th). While *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7th), certiorari denied, 382 U.S. 903, based denial of injunctive relief primarily on the jurisdictional basis, the court also stated (p. 366):

* * * collateral determination of the admissibility of evidence in an administrative tax proceeding or investigation is not a proper sphere for in-

nus, Mabee & Reynard, Inc. v. United States, 311 F. 2d 12 (2d Cir.), cert. denied, 373 U.S. 982 (1962); *In Re Turner*, 309 F. 2d 29 (2d Cir. 1962); *Campbell v. Guetersloh*, 287 F. 2d 878 (5th Cir. 1961).

junctive intervention in the exercise of equitable jurisdiction.

Taxpayer's reliance on the constitutional privileges guaranteed by the Fourth and Fifth Amendments, and the attorney-client privilege, does not, at this preliminary stage, enlarge her right to relief. Courts of Appeals have uniformly ruled that the *Escobedo* and *Miranda* cases (*Miranda v. Arizona*, 384 U.S. 436; *Escobedo v. Illinois*, 378 U.S. 478) do not bar non-custodial interrogation of taxpayers. *Rickey v. United States*, 360 F. 2d 32 (C.A. 9th), certiorari denied, 385 U.S. 835; *Kohatsu v. United States*, 351 F. 2d 898 (C.A. 9th), certiorari denied, 384 U.S. 1011. *Selinger v. Bigler*, 377 F. 2d 542 (C.A. 9th), certiorari denied, 389 U.S. 904. As to the attorney-client privilege, this Court in *Baird v. Koerner*, 279 F. 2d 623 noted the general rule that the client's identity is not privileged but that special circumstances might create an exception. No special circumstances whatever are suggested by taxpayer in this case and, if there be such, their development is the proper function of a summons enforcement proceeding in the District Court. Cf. *Frank v. Tomlinson*, 351 F. 2d 384 (C.A. 5th), certiorari denied, 382 U.S. 1028 (attorney whose tax liability is under investigation must reveal names of clients).

Taxpayer appears to be contending for an immunity from inquiry and investigation far beyond any protected right. Her extreme contention makes apropos the opinion in *Giancana v. Hoover*, 322 F. 2d 789, 790 (C.A. 7th):

The courts will not assume to supervise and direct the manner in which members of the executive department shall proceed to perform their responsibilities. That would be an unwarranted interference and intrusion upon the discretion vested in this case, for instance, in the director of the Federal Bureau of Investigation.

Whether official inquires are inconvenient, annoying, or oppressive is a highly subjective matter and injunctive relief is generally withheld in deference to the legal remedy. Annotation, What Constitutes Official Oppression, 83 A.L.R. 2d 1007; *Forster v. Manchester*, 410 Pa. 192, 189 A. 2d 147, 151, 152 (no injunction against surveillance of tort claimant); cf. Annotation, Right of Action for Damages Due to Debt Collection Methods, 55 A.L.R. 971, 106 A.L.R. 1453. But where the official seeks judicial assistance to enforce his writ or inquiry, the citizen is entitled to plead that his action exceeds a lawful scope. *Shasta Minerals & Chemical Co. v. Securities & Exch. Com'n*, 328 F. 2d 285 (C.A. 10th). Taxpayer in this case has prematurely sought relief against official action well within the lawful scope of the District Director's authority.

II

NO SUBSTANTIAL CONTROVERSY EXISTS AS TO THE AUTHORITY OF THE APPELLEES TO INVESTIGATE TAXPAYER'S CORRECT TAX LIABILITY AND THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENJOIN THEM FROM PURSUING THE INVESTIGATION

The trial court did not reach the issue of its jurisdiction to enjoin appellees from investigating tax-

payer's correct tax liability. However, appellees submit that Section 7421(a) of the Internal Revenue Code of 1954, *supra*, applies and supplies an independent reason to affirm the judgment below. Taxpayer in no way pleads the facts necessary to avoid the bar of Section 7421, namely, that the Government could in no circumstances ultimately prevail and that taxpayer has no adequate remedy at law. *Enochs v. Williams Packing Co.*, 370 U.S. 1. The bar of Section 7421 applies as well to investigation of tax liability as to assessment and collection. *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5th). Taxpayer's attempt to anticipate questions relating to admissibility of evidence is also subject to the bar of Section 7421. *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7th).

In *DeMasters v. Arend*, 313 F. 2d 79, petition for certiorari dismissed, 375 U.S. 936, this Court held (p. 84) that where a "substantial controversy" was presented as to the Commissioner's power to examine tax years barred save for fraud, jurisdiction was conferred by 28 U.S.C., Section 1340, *supra*, to entertain an action for an injunction. But appellant here shows no plausible reason why the Commissioner lacks authority to inquire into her correct tax liability.

Lastly, 28 U.S.C., Section 2201, *supra*, barring declaratory judgments with respect to taxes, should be noted. Though taxpayer does not appear to request it, such relief was included in the caption of her complaint. (I-R. 1.)

CONCLUSION

For the reasons set forth above the judgment of the District Court should be affirmed.

Respectfully submitted,
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April, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated, San Francisco, California,
 April 17, 1968.

RICHARD L. CARICO,
 Assistant United States Attorney.

Nos. 22495 and 22495-A

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PROLER STEEL CORPORATION, *Appellant*,

v.

LURIA BROTHERS & COMPANY, INC.
and LIPSETT STEEL PRODUCTS, INC., *Appellees*.

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Nos. 22495 and 22495-A

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PROLER STEEL CORPORATION, *Appellant*,

v.

LURIA BROTHERS & COMPANY, INC.
and LIPSETT STEEL PRODUCTS, INC., *Appellees*.

APPELLANT'S BRIEF

I.

JURISDICTION

Jurisdiction of the district court is based on 28 U.S.C. § 1338(a) and venue is predicated upon 28 U.S.C. § 1400 (b). A final judgment having been entered in said district court on September 27, 1967 (*R. 625), this court of appeals has jurisdiction of this appeal under 28 U.S.C. §1291 and Fed. R. Civ. P. 73(a), (b).

Appellant Proler Steel Corporation filed its notice of appeal on October 26, 1967 (R. 672), and filed its

* Transcript of Record.

statement of issues to be presented on appeal on November 3, 1967 (R. 696). Following the district court's denial of appellant's motion under Rules 52 and 59 of the Federal Rules of Civil Procedure and for reconsideration (R. 628, 721), appellant filed a further notice of appeal on December 4, 1967 (R. 725), and again filed its statement of issues to be presented on appeal on December 13, 1967 (R. 730). A cost bond on appeal was filed in connection with both appeals (R. 693, 727).

By order of this court the appeals have been consolidated.

II.

STATEMENT OF THE CASE

A. THE PARTIES

Appellant (plaintiff below, Proler Steel Corporation), is a Delaware corporation having its principal place of business in Houston, Texas, and is the sole owner of United States letters patent Re. 25,034 (R. 205, 206). Proler's principal business is the processing of scrap metals to prepare them for sale to steel manufacturers and to others (Ex. B).*

Appellee Luria Brothers & Company, Inc. (hereinafter referred to as Luria) is a Delaware corporation and has a regular and established place of business and is doing business in Vernon, California (R. 196).

* A book of exhibits was attached to appellant's "Memorandum in Opposition to Defendants' Motion for Summary Judgment". These are the exhibits referred to throughout this brief. Copies of those same exhibits accompany this brief in a separate exhibit volume.

Appellee Lipsett Steel Products, Inc., is a New York corporation having a regular and established place of business and doing business in Vernon, California (R. 196).

The principal business of Luria and Lipsett is the processing of scrap metals for sale to steel manufacturers and others.

Both appellees are licensed to do business and are doing business in Vernon, California, in the Central District of California (R. 196).

B. ACTION IN THE COURT BELOW

This is a suit for infringement by appellees of appellant's letters patent Re. 25,034 (R. 335). Appellees have answered and filed a counterclaim to the suit alleging invalidity of the patent (R. 188) and appellant has answered these allegations (R. 201). The district court entered summary judgment for appellees (R. 625), adopting all of the findings of fact and conclusions of law submitted by appellees (R. 610) and holding for them on all five counts in appellees' motion (R. 281).

There were genuine issues of material fact with respect to every defense raised by the motion for summary judgment, and therefore the judgment entered was improper and should be reversed.

C. GENERAL BACKGROUND AND THE PATENT IN SUIT

The patent in suit is a reissue patent, Re. 25,034 (R. 335), which describes and claims a process by which obsolete scrap is converted into a high-grade ferrous material suitable for feeding directly into steel furnaces for making new steel (R. 338, col. 1, lines 14-20). Ob-

solete scrap is that which comes from manufactured articles, such as old automobile bodies, stoves, and refrigerators, which have outlived their usefulness (R. 338, col. 1, line 65, to col. 2, line 8).

Only claim 9 of the patent in suit is at issue (R. 208). Appellees own and operate a plant in Vernon, California, which is alleged to practice a process which infringes claim 9 (R. 207).

Appellees alleged in their motion for summary judgment five separate and distinct grounds (R. 282):

1. Claim 9 of the Proler reissue patent is invalid for claiming a mere aggregation of steps old in the art.

2. Appellees' accused process does not infringe claim 9 of the Proler reissue patent.

3. Claim 9 of the Proler reissue patent is invalid on the ground that the invention claimed therein is not the invention disclosed in the original Proler patent No. 2,943,940, of which the patent in suit is a reissue.

4. Claim 9 of the Proler reissue patent is invalid on the ground that the defect of the original patent did not arise through error.

5. Claim 9 of the Proler reissue patent is invalid on the ground that the oath in support of the application for the reissue patent fails to show that the original patent was wholly or partly inoperative or invalid through error.

Summary judgment was granted appellees on all these grounds (R. 625). The Record discloses that there were genuine issues of fact material to each ground, hence this appeal.

III.

SPECIFICATION OF ERRORS

1. The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent was invalid for claiming a mere aggregation of steps old in the art and as failing to meet the statutory test of non-obviousness because there was evidence before the court sufficient to raise genuine issues of material fact as to both these defenses.

In its findings of fact and conclusions of law made in support of this holding the district court erred:

a. In making finding of fact 3 for the reason that there was substantial evidence before the court sufficient to raise genuine issues of material fact thereon.

b. In making findings of fact 3.1 and 3.2 for the reason that they are immaterial to any question of validity of a process patent.

c. In making findings of fact 3.3, 3.4, 3.5, 3.6 and 3.7 because there is no evidence to support them, or alternatively, genuine issues of material fact exist as to one or more of them.

d. In making conclusion of law 1 for the reason that it is contrary to the law on aggregation and obviousness, and for the further reason that there was substantial evidence before the court sufficient to raise genuine issues of fact material thereto.

2. The district court erred in holding on summary judgment that appellees' process does not infringe appellant's patent because there was evidence before the court sufficient to raise genuine issues of material fact as to infringement.

In its findings of fact and conclusions of law made in support of this holding, the district court erred:

a. In making findings of fact 4, 4.7 and 4.8 because there was evidence before the court sufficient to raise genuine issues of material fact thereon. Further, finding 4.7 erroneously refers to the "function" of rolls, since claim 9 is not limited to rolls.

b. In making findings of fact 4.1 and 4.2 in that such findings are not material to support a finding of no infringement.

c. In making finding of fact 4.3 because it is contrary to the evidence in the implied finding that after April, 1965, appellees produced Lurmet in the same density range as all of the product produced before that date.

d. In making finding of fact 4.4 in that it erroneously states appellant's charge of infringement.

e. In making finding of fact 4.5 in that it is vague and indefinite in the use of the term "material."

f. In making finding of fact 4.6 because said finding is immaterial in that a process claim is not limited to the equipment disclosed.

g. In making conclusion of law 2 for the reason that it includes findings on summary judgment which are the subject of material issues of fact, it erroneously states that rolls are described in the third step of claim 9, and further it is erroneous as a matter of law in that it compares the equipment used in appellees' operation with the equipment used in appellant's commercial operation, rather than comparing appellees' process with the patented process.

h. In making conclusion of law 3 because the evidence raises genuine issues of material fact on infringement. Also, it is erroneous as a matter of law because 35 U.S.C. § 112 does not limit the *step* in a process to the *equipment* used.

3. The district court erred in holding on summary judgment that the Proler reissue patent was invalid as not claiming the invention disclosed in the original patent for the reason that there was evidence before the court sufficient to raise genuine issues of material fact as to this defense.

In its findings of fact and conclusions of law relating to this defense, the district court erred:

a. In making finding of fact 2.2 for the reason that it erroneously sets forth what is described in the patent.

b. In making finding of fact 2.3 for the reason that the arguments referred to are immaterial to this ground.

c. In making finding of fact 2.4 because it is immaterial in that the statute provides that reissue claims may be broader than original claims.

d. In making conclusion of law 4 for the reason that there is evidence in the Record sufficient to raise genuine issues of material fact with reference to said conclusion.

4. The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent was invalid on the ground that the defect of the original Proler patent did not arise through error because there was evidence before the court sufficient to raise genuine issues of material fact as to this defense.

a. The district court erred in making conclusion of Law 5 because there is no evidence to support it, or alternatively, there was substantial evidence before the court sufficient to raise a genuine issue of material fact thereon.

5. The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent is invalid on the ground that the oath filed with the application for reissue fails to show any error because there is no evidence to support this, or alternatively, there was sufficient evidence before the court to raise genuine issues of material fact thereon, and on whether the commissioner had sufficient evidence of error before him from the file record to determine there was error within the meaning of 35 U.S.C. § 251.

In its finding of fact and conclusions of law made in support of this holding, the district court erred:

a. In making finding of fact 2.7 for the reason that it is contrary to the evidence, or in the alternative, there is evidence in the Record sufficient to raise a genuine issue of material fact thereon.

b. In making conclusions of law 6 and 7 for the reason that they are contrary to the evidence, or alternatively, there was substantial evidence before the court sufficient to raise genuine issues of material fact thereon.

6. The district court erred in granting appellees' motion for summary judgment.

7. The district court erred in dismissing the complaint.

8. The district court erred in overruling appellant's motion under rules 52 and 59 of the Federal Rules of Civil Procedure and for reconsideration.

IV.

SUMMARY OF THE ARGUMENT

On summary judgment, all conflicting fact possibilities must be decided in favor of the party opposing the motion.

The claim at issue covers a process and is presumed to be valid. On an issue of invalidity all reasonable doubt must be resolved in favor of the patent.

The process described in claim 9 is capable of contemplation by the mind apart from any one of the specific instruments by which it is performed, and was therefore patentable as a process. The material inquiry is whether the *steps* of claim 9 were known in the art, not whether there existed machines in the art capable of accomplishing the individual steps.

It was error for the district court to hold on motion for summary judgment that the process of claim 9 was an aggregation of old elements known in the art, because there were genuine issues of material fact raised by the evidence on

- 1) whether *all* of the steps of claim 9 were old (there being ample evidence that step 3 was new); and

- 2) whether the combination of steps in claim 9 produced something new and unusual or unexpected in the art of scrap processing, in the form of pure, dense steel particles in a fluent form, for use in making new steel.

If either one of these fact inquiries are answered in appellant's favor the process of claim 9 is not invalid as an aggregation of old elements.

Further, in connection with this defense on validity, there is in the Record ample evidence to raise a genuine issue of material fact on each of the six factual inquiries bearing on whether the process of claim 9 was obvious at the time it was made to those skilled in the art.

There is evidence in the Record sufficient to raise a genuine issue of material fact as to whether appellees infringe claim 9 of the patent in suit. The fact that they

do not use a particular machine to perform step 3 of claim 9 or that there may be some subdivision of the fragments of steel when they perform step 3 does not excuse infringement.

There is evidence in the Record sufficient to raise a genuine issue of material fact as to whether claim 9 covers the invention disclosed in the original patent.

There is evidence in the Record in the file history of the patent sufficient to raise a genuine issue of material fact on whether there was error without deceptive intention sufficient to support the reissue of the patent within the meaning of 35 U.S.C. § 251.

The oath of Sam Proler filed with the application for the reissue patent points out that the error in the original patent was in failing to claim broadly enough to provide adequate coverage of the invention. Further, the Record contains evidence which was before the patent office of the error in the original patent. The patent law does not require an oath as a basis for reissue, much less that it be in any particular form.

V.

ARGUMENT

A. HISTORY

The problem of what to do with worn-out automobiles, household appliances and other manufactured articles which outlive their usefulness has long plagued processors and users of scrap iron and steel (R. 341). It has long been recognized that the approximate 80 per cent iron and steel in such worn-out goods would be very valuable if it could be recovered efficiently and delivered to the steel manu-

facturers in a form in which it could be used readily in the making of new steel (Ex. A). However, for decades the best method known for processing such materials, known as obsolete scrap in the trade, was to drop the articles, including the 20 per cent of impurities, into a large press which mashed everything together into a solid, bulky bundle or bale, known as a No. 2 bundle, which often weighed a ton or more. Much fault was found with such bundles. Steelmakers were unable to tell the level of impurities in the bundles they received. Steelmakers dropping 2,000 pound bundles into their furnaces lined with refractory brick often caused breakage of the furnace lining, and falling bundles during the melting process often broke the large carbon electrodes used in the electric furnaces. The unknown impurities caused a great deal of smoke and fumes. Furthermore, the bundles would not fit compactly into the furnace so that it was difficult to get a high enough weight of steel in a single charge for efficient operation of the steel furnace (Ex. A). Consequently, the acceptability of these bundles had declined over the years (Ralph Ablon dep., pp. 41-43).

In 1935 Clarence M. Gregg, recognizing the existence of these problems, filed a patent application, which ultimately issued as patent No. 2,059,229 (R. 340), on a process which he thought would solve most of them. This process was practiced by Los Angeles By-Products Company. In this process pieces of obsolete scrap were shredded in a hammer mill to make shredded fragments of steel and to loosen adhering non-ferrous materials. The ferrous (iron and steel) shredded fragments were then separated from the non-ferrous materials by a magnetic blanket and put into a baling press where they were interlocked in a bale or bundle. They used this process for several years, and made

extensive attempts to interest others in it, including the government during World War II, but were unable to do so (Sexton dep., pp. 17, 18, 20, 21, and 121). They finally abandoned the process as an economic failure (Sexton dep., p. 139).

One scrap processor who became acquainted with the Gregg process at that time was appellee Luria, who was and still is the largest scrap processor in the world (Derlacki dep., Oct. 29, 1965, p. 152) and has been in business since about 1890 (R. 13). For over twenty years, beginning in about 1939, appellee Luria sought, by means of the Gregg process and others, to improve the method of processing obsolete scrap. They first bought a large hammer mill and then a large shear, but gave up on both of them (Ralph Ablon dep., pp. 18-36). Thus, despite these efforts by Los Angeles By-Products Company and by Luria, up until the time of the present invention no one had found a solution to the problem of obsolete scrap.

In the process of the patent in suit (R. 335), conceived in 1957 by Sam Proler, President of appellant (R. 32), obsolete scrap is first shredded into small pieces. This may be done by dropping it into a huge hammer mill large enough to receive a whole automobile. A hammer mill is a machine which has a rotor enclosed within a housing and large (appellees' hammers have a five-inch face width [Magness dep., Oct. 29, 1965, p. 71]) free-swinging hammers attached to the rotor (Proler dep., pp. 31-38, and Ex. 2 attached thereto). Second, the ferrous shredded fragments are separated from non-ferrous materials by any of several means, such as magnetically, by burning, by shaking on a screen, or by hand-picking. In the third step of the patented process, the thinner and

more malleable ferrous fragments are *individually compacted and balled up* so as to form a product of higher density while maintaining the individuality of the separate pieces so that a flowable mass of clean, high density scrap is obtained. This third step had never before been performed and the process produced a product which was never before known.

This innovation, conceived by Sam Proler, literally transformed the obsolete steel scrap market. The form of the material was such as to make it easy to handle and eliminate refractory and electrode breakage, and it had a high enough density to satisfy the steelmakers. It could be readily inspected for impurities. Furthermore, it was nearly 100 per cent steel (Magness dep., Oct. 29, 1965, pp. 101-105). Sam Proler's invention solved substantially all of the problems that steelmakers had been having with No. 2 bundles and commanded a price equal to or better than the best grade of scrap then available (Ex. B).

Appellant completed its first plant for the practice of this process in 1958 and has since completed five additional plants all over the United States and has one under construction in London, England (Ex. B).

When appellee Luria heard of this new process, they immediately set out to see if they could duplicate it (Burlingame dep., June 1, 1966, pp. 34, 35). They had recently hired Mr. William R. Magness, formerly with Battelle Institute, to head up their research work. Mr. Magness was familiar with the field, having previously made studies on the needs of the scrap industry (Magness dep., Oct. 29, 1965, pp. 8-12). Luria personnel studied the Proler patent (Derlacki dep., March 28, 1963, p. 22) and entered one of appellant's plants and made

notes and drawings on appellant's operations (Exs. G, H and I). They then sought out a hammer mill manufacturer, Williams Patent Crusher & Pulverizer Company of St. Louis, to design and build equipment for a plant.

At first, appellees intended to have a three-step process in which a hammer mill would be used to shred the obsolete scrap, magnetic drums would be used to separate the ferrous fragments from the non-ferrous material, and a second hammer mill (called a "nuggetizer") would be used to individually compact and ball up the shredded steel fragments (Ex. Q). However, they apparently decided that this was closer to the patented process than they dared go, so they conceived the idea of taking the larger ferrous fragments and sending them through the same hammer mill as that which processed the original charging stock, since this would perform, in a more devious manner, the same step as the "nuggetizer" (Ex. N), that of compacting the shredded pieces (Ex. M).

Learning of this, in December, 1962, appellant herein brought an action against appellee Luria seeking a declaratory judgment holding that the process to be practiced by appellees' plant, when completed, would infringe the patent here in suit.* In that action appellees admitted that they intended to perform steps 1 and 2 of claim 9 of appellant's patent (Exs. E and F). The question at issue was whether they also intended to use step 3 of claim 9 by sending the previously shredded pieces of steel scrap through the hammer mill to increase their density by individually compacting and balling them up. Appellant's suit for declaratory judgment was eventually dismissed as

* Certified copies of the papers of that case form a part of the Record herein (admitted by appellees at R. 173), and are in a separate volume of the Record.

moot due to the filing of an affidavit by Walter R. Derlacki, General Manager of Engineering for appellee Luria. In that affidavit he told the court that the appellees' plant was complete and that they did not intend to employ step 3 in their process (Ex. F).

For approximately a year after that, appellees kept their word, but they found that without the third step, they were unable to economically produce a product that was dense enough to satisfy their customer, Bethlehem Steel Company (Burlingame dep. June 1, 1966, pp. 16-22). Consequently, in April, 1965, appellees modified their operation to install equipment for running the larger, shredded fragments through their hammer mill, thereby employing the third step of Proler's patented process. At this point, since appellees were then using all three steps of appellant's process, this action was filed.

B. THE LAW ON MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment the District Court must give the party who opposes the motion the full benefit of any doubt which may be created by the evidence presented to the court. The court *cannot decide any fact issues*, but can grant summary judgment only where it is quite clear what the truth is and where no genuine fact issue remains for trial. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468, 7 L.Ed.2d 458 (1962); *Cee-Bee Chemical Co. v. Delco Chemicals*, 263 F.2d 150, 152 (9th Cir. 1958); and *Hughes Blades, Inc. v. Diamond Tool Associates*, 300 F.2d 853, 854 (9th Cir. 1962).

When a case is presented to the court on a motion for summary judgment all conflicting fact possibilities must

be decided in favor of the party opposing such motion. Note the following statement by the Supreme Court in *Gunning v. Cooley*, 281 U.S. 90, 74 L. Ed. 720 (1930):

“Where uncertainty . . . arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury.” *Gunning, supra* at 94.

Thus, the law is well settled that if any material facts are in dispute, or, the facts not being in dispute, different conclusions might be drawn from the facts, the motion for summary judgment cannot be granted, since all conflicting possibilities must be decided in favor of the party opposing the motion.

Furthermore, the Ninth Circuit Court of Appeals has held that there still may be fact questions to be adjudicated even if the proof of a fact is all documentary, and that in such a case summary judgment is improper. Note the statement in *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F.2d 353 (9th Cir. 1955): “. . . any tendency to abolish trial in patent cases for consideration of documents in camera should be curbed.” *Hycon, supra* at 356.

Finally, the courts have consistently held that all doubts must be resolved against the moving party (*Cox v. American Fidelity & Casualty Company*, 249 F.2d 616, 619 (9th Cir. 1957)); and the evidence presented must be viewed in the light most favorable to the party opposing the motion. *Poller v. Columbia, supra* at 473.

C. THE DEFENSE OF AGGREGATION AND OBVIOUSNESS

Specification of Error No. 1 restated:

The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent was invalid for claiming a mere aggregation of steps old in the art and as failing to meet the statutory test of non-obviousness because there was evidence before the court sufficient to raise genuine issues of material fact as to both these defenses.

1. The Process

The statute clearly provides for patenting a process: "Whoever invents or discovers any new and useful process, . . . may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101.

"Process" is defined in the statute:

"The term 'process' means process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." 35 U.S.C. § 100(b).

There are three steps in claim 9. (1) The obsolete scrap is shredded into fragments, (2) the ferrous fragments are separated from the non-ferrous materials, and, (3) the shredded, separated ferrous fragments are individually compacted and balled up, so that a fluent mass of pure dense steel fragments is the end product.

Appellant's process is an operation which consists entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines. It was definitely settled that a process of this

type was the subject of a patent in *Expanded Metal Company v. Bradford*, 214 U.S. 366, 53 L. Ed 1034 (1909).

The patented process in *Expanded Metal* involved two mechanical steps, i.e., (1) cutting the sheet metal, and (2) pulling at the same time in a plane close to 90 degrees from the plane of cutting. The Supreme Court in *Expanded Metal* stated "The important thing in this patent is a method of procedure, not the particular means by which the method shall be practised. . . ." *supra* at 381.; and further held:

"We therefore reach the conclusion that an invention or discovery of a process or method involving mechanical operations, and producing a new and useful result, may be within the protection of the Federal statute, and entitle the inventor to a patent for his discovery." *Expanded Metal, supra* at 385, 386.

The Supreme Court, in upholding the process in *Expanded Metal*, quoting in part from *Walker on Patents*, the leading treatise in the field, stated:

"... valid process patents may be granted for 'operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines.'

"It is undoubtedly true, and all the cases agree, that the mere function or effect of the operation of a machine cannot be the subject-matter of a lawful patent. But it does not follow that a method of doing a thing, so clearly indicated that those skilled in the art can avail themselves of mechanisms to carry it into operation, is not the subject-matter of a valid patent. The contrary has been declared in decisions of this court." *Expanded Metal, supra* at 383.

The three steps in appellant's patent are capable of contemplation by the mind apart from any one of the specific instruments by which they may be performed. *Deller's Walker On Patents* quotes *Robinson on Patents*, as follows:

"An art or operation or process is an act or series of acts performed by some physical agent upon some physical object, and producing on such object some change either of character or of condition. It is also called a 'process', or a 'mode of treatment'; and is said to require that 'certain things should be done with certain substances in a certain order.' It is so far abstract that it is capable of contemplation by the mind apart from any one of the specific instruments by which it is performed. It is so far concrete that it consists in the application of physical force through physical agents to physical objects, and can thus become apparent to the senses only in connection with some tangible instrument and object." 1 *Deller's Walker on Patents*, § 15 at 118, 119 (2d ed. 1964).

The United States Supreme Court in *Cochrane v. Deener*, 94 U.S. 780, 24 L. Ed. 139 (1877), clearly described a process such as that which is the subject of appellant's patent in the following passage:

"That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed . . . A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process

may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result." *Cochrane, supra* at 787.

The Ninth Circuit Court of Appeals adheres to these rules on process patents. *Elrick Rim Company v. Reading Tire Machinery Co.*, 264 F.2d 481 (9th Cir. 1959).

2. Aggregation Defense

In the district court appellees raised, in their motion for summary judgment, the allegation that, as a matter of law, claim 9 of appellant's patent was invalid for claiming a "mere aggregation of steps old in the art."

At the outset this honorable court should take into consideration that an issued patent, such as appellant's, is presumed to be valid. The burden of establishing invalidity is on the party asserting it. 35 U.S.C. §282. Because of the presumption of validity *all reasonable doubts* on the question of validity are resolved in favor of the patent owner. *Moon v. Cabot Shops, Inc.*, 270 F.2d 539, 541 (9th Cir. 1959); *Patterson-Ballagh Corp. v. Moss*, 201 F.2d 403, 406 (9th Cir. 1953).

In order to prevail on this allegation as a matter of law, it is first incumbent upon appellees to prove beyond all reasonable doubt that there is no genuine issue of material fact on whether *all* of the steps in appellant's process were old in the art. *Coleman Company v. Holly Manufacturing Company*, 233 F.2d 71, 78 (9th Cir. 1956).

Appellees failed in the district court to submit *any* evidence that step 3 of appellant's process was old at the time of the invention which is the subject matter of the patent. Instead, appellees attempted to equate appellant's past practice of passing whole tin cans through

rollers with step 3 of the patented process. There is evidence in the Record that this previous practice of appellant is simply not the same operation as step 3 of claim 9 (see affidavit of Sam Proler, Ex. B). The whole tin cans were put through rollers to flatten them in order to get them in better condition to ship to plants for processing the cans as precipitation iron for use in the copper mines. It is clear that the operation bears no reasonable relationship to step 3 in claim 9, which consists of compacting and balling up *shredded and cleaned steel fragments* as the third and last step in the preparation of a product for use in steel furnaces.

Certainly it is true that reasonable minds might differ on whether these two operations are the same. Therefore, a material issue of fact exists. *Cee-Bee v. Delco, supra*; *Gunning v. Cooley, supra*; and *Cox v. American Fidelity & Casualty Co., supra*.

Material to this question is the negative fact that appellees, with all the resources at their command, some five years after the first suit on this patent was filed and after depositions had been taken all over the country, failed to cite a single instance where pieces of shredded ferrous scrap have been individually compacted and balled up in the prior art. In *Coleman*, it was held that one of the "pertinent fact questions" to be decided under the rule of the *A & P* case,* was "were *all* of the elements of this device old, well-known, or used in the art when it was patented?" (Emphasis by the Court.)

Since there is at least a material issue of fact on whether step 3 of claim 9 of the Proler patent is new or

* *Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation*, 340 U.S. 147, 95 L.Ed. 162 (1950).

old, appellees were not entitled to summary judgment on their "aggregation" defense.

In addition to their burden of proving beyond a reasonable doubt that there is no fact issue as to whether all of the steps of claim 9 were old in the art, appellees have an additional onerous burden in order to establish the defense of "aggregation" as a matter of law. They are also required to prove that there is no genuine issue of material fact as to whether anything new, useful or unexpected was produced as a result of the combination of the three steps in the Proler patent. *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 252, 255 (9th Cir. 1957).

Appellees did not introduce *any* evidence in the court below to the effect that a process existed before the issuance of the Proler patent which contained the three steps set forth in claim 9. Further, appellees were unable to cite a *product* produced before the Proler invention which consisted of pure, shredded steel scrap which had been individually compacted and balled up, so as to constitute a fluent or flowable mass having a density high enough for use in the steel mills. As a matter of fact, all of the evidence which we will hereafter mention leads to the inevitable conclusion that before Sam Proler invented the patented process there was no such product. The product produced by this new process is a new, useful and unexpected result in the art. *Coleman v. Holly, supra* at 79.

In *National Latex, infra*, the Sixth Circuit Court of Appeals held valid a patent on a process for molding a plastic article and stated as follows:

"We think the judgment should be affirmed mainly because Molitor has obtained a *new product*,

presenting novel features highly useful in the art, which have received the tribute of the industry by being extensively adopted." *National Latex Products Company v. Sun Rubber Company*, 274 F.2d 224, 239 (6th Cir. 1959), (Emphasis added)

Since the issuance of the appellant's patent, appellees have, by the infringing process, produced a product indistinguishable from that of appellant. The products of appellant and appellees were clearly equated by Dr. Richard E. Burlingame, the appellees' Chief Metallurgist, in his deposition testimony. (Burlingame dep., June 1, 1966, pp. 29-33.)

Appellees' own employees have testified to the new and unusual nature of this product:

- (a) Mr. Carl Ablon, President of appellee Luria, after terming appellees' process "new", referred to the product of that process as "the scrap metal of the future." (Ex. J)
- (b) In a press release in July, 1966, appellee Luria called the product of the infringing process "a new ferrous scrap metal" and stated that it should "contribute significantly to the nation's beautification effort." (Ex. K)
- (c) In another press release in October, 1966, appellees called the infringing process a "significant contribution to the industry" and a "dramatic processing technique." (Ex. L)
- (d) In still another press release appellees indicated that their plant in Detroit "represents a major step in converting unsightly junked cars into a useful resource." (Ex. S)

- (e) On deposition William R. Magness, Vice President in charge of Research and Engineering for Luria, testified that Lurmet, the product which appellees produce by the infringing process, was considered a superior form of scrap (Magness dep., Oct. 29, 1965, p. 101); that the chemical and physical characteristics of that product are superior to all grades of bundled material, other than the No. 1 bundle (which is not made from obsolete scrap); that it melts faster and hence requires less power input for a given ingot tonnage rate; that it stores better than bundles; that its angle of repose and its density make it a desirable form of scrap; that it lends itself to superior handling because it is more granular in form than, say, a bundle or a piece of structural steel; that it can be conveyed more easily; that it can be poured; that the chemistry of the product is uniform from batch to batch; and that it is essentially free from all non-ferrous or non-metallic material, which is "very important." (Magness dep., Oct. 29, 1965, pp. 101-105).
- (f) Dr. Burlingame testified to these same things and enumerated other advantages of the new product. (Burlingame dep., June 1, 1966, pp. 30-35)
- (g) Dr. Burlingame testified that the product of Luria (a fluent mass of compact, pure pieces of steel) was an entirely different product from the No. 2 bundle (wherein an entire automobile, for example, is compressed into a large bulky block) (Burlingame dep., June 1, 1966, p. 36). His testimony on deposition on two occasions was that the product was a "new and revolutionary" product in the

scrap industry (Burlingame dep., June 1, 1966, pp. 24, 39).

- (h) Mr. Magness testified that one could not reasonably expect to bale this new product because the bale or bundle would not hold together due to the high density of the fragments (Magness dep., Oct. 29, 1965, p. 148).

Under the evidence in this case, the third step in claim 9 is new. The evidence pertaining to the new, useful, and unexpected result above set out clearly creates a genuine issue of material fact in the second requirement of the aggregation defense.

In *Moist Cold Refrigerator* this same issue was held to be a question of fact in the following language:

“We find that reasonable minds might differ as to whether there was ‘a new, useful and unexpected result’; whether or not there was an ‘additional or different function’; whether the whole did or did not, in some way, exceed the sum of its parts.” *Moist Cold Refrigerator*, *supra* at 254.

In the *Moist Cold Refrigerator* case, a judgment notwithstanding the verdict in the district court against the patent was reversed and remanded. The patent in that case involved a refrigerator with a separate freezing compartment and a separate cooling compartment operated by a single liquefying unit.

In *Coleman* this court held that one of the “pertinent fact questions posed” was (if all of the elements were found old):

“... did they take on ‘some new quality or function which produced a new and better result in the room-

heating art from being brought into concert'? If so, did these elements then contribute to the room-heating art any new and unique quality and distinction which reflect novelty and utility and thus contribute any measurable and substantial advance in that art?" *Coleman, supra* at 78.

The Ninth Circuit Court of Appeals also held to the same effect in *Beatty Safway Scaffold Co. v. Up-Right, Inc.*, 306 F.2d 626 (9th Cir. 1962).

It is clear from the evidence (most of which comes from appellees' own personnel) that the steps of the process of the patent in suit produced a product which was new, useful, and unexpected. Mr. Magness, the Vice President of appellee Luria, and Dr. Burlingame, the Chief Metallurgist for appellees, have amply supplied proof of the benefit which this new product brought to the scrap industry and the fact that it revolutionized the processing of obsolete scrap, which formerly took the form of the No. 2 bundle.

It is abundantly clear that at the very least a material issue of fact has been raised on whether the process of the patent in suit has contributed something new, useful and unexpected to the art.

3. Obviousness

The foregoing discussion on aggregation has been directed to the precise defense raised by appellees in their motion for summary judgment. But appellees themselves seem to recognize that this defense is actually directed toward the statutory standard of invention as expressed in 35 U.S.C. § 103, which is whether

"the differences between the subject matter sought to be patented and the prior art are such that the

subject matter *as a whole* would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” (Emphasis added)

In *Graham v. John Deere Co.*, 383 U.S. 1, 15 L. Ed. 2d 545 (1966) the Supreme Court delineated certain inquiries which it recognized as factual and which bear on the statutory test of non-obviousness. The Record in this case is replete with evidence supporting non-obviousness under these tests, as hereinafter set out, and clearly raises genuine issues of material fact:

a) *The Scope and Content of the Prior Art*

The only prior art relied on by appellee consists of the Gregg process, which did not include step 3 of claim 9, and the use by Sam Proler of rolls to flatten whole tin cans in readying them for shipment to be processed as precipitation iron for the copper mines. There is *no prior art in the record* showing the third step of claim 9, that of individually compacting shredded ferrous scrap particles as a product for steel furnaces.

b) *The Differences Between the Prior Art and the Claims at Issue*

In the Gregg patent and in the process as practiced by Los Angeles By-Products Company step 3 of claim 9 of the Proler patent was not included.

Carl C. Sexton, the President of Los Angeles By-Products Company, made it clear in his testimony that the product produced by the Gregg process ended up in the form of a bundle (Sexton dep., page 36). Mr. Magness, as above pointed out, testified that he doubted that the product of the infringing process could be com-

packed into a bundle because of its density. He further testified that the cost would be high to prepare a No. 2 bundle having roughly the same chemical characteristics as the product of the infringing process and that he did not consider it practical to try to do so. (Magness dep., Oct. 29, 1965, p. 103).

As discussed previously, Sam Proler's practice of putting whole tin cans between rolls to flatten them for shipment to the processing plant is not the same as individually compacting pieces of shredded steel scrap as the final step in preparing a product for use in the steel mills. (affidavit of Sam Proler, Ex. B).

In the only prior art relied on by appellees the final product was a bundle of scrap. On the other hand, the final product of the process of the Proler patent is a fluent or flowable mass of individually compacted small particles of steel.

c) *The Level of Ordinary Skill in the Pertinent Art*

Los Angeles By-Products Company had many years of experience in the art of scrap processing before Sam Proler's invention, having practiced the Gregg process from 1936 to the beginning of World War II, and for sometime thereafter. (Sexton dep., p. 12). In spite of the advent of World War II, with its big demand for steel products, as testified to by Dr. Burlingame (Burlingame's dep., June 1, 1966, p. 44), Los Angeles By-Products Company substantially abandoned the Gregg process during the War years. It obviously never occurred to them that a product of adequate density for use in the steel mills could be produced by individually compacting the pieces of shredded steel scrap. Instead, they abandoned the Gregg process as an economic failure at a time when

steel scrap was at a premium. They could not even sell it to Los Angeles Steel Casting Company, which was their parent company, and which was in the steelmaking business (Sexton dep., pp. 122-124).

As late as 1957 (shortly after Sam Proler conceived his invention) Mr. William R. Magness, Vice President of appellee Luria, was one of three authors of a report by the Battelle Memorial Institute to the Institute of Scrap Iron and Steel resulting from an extensive study of scrap quality requirements (Ex. A). The study covered various scrap grades available at that time, including the No. 2 bundle. The report particularly noted the difficulties in density, purity and size encountered by the industry in the then only known product of obsolete scrap, i.e., the No. 2 bundle.

Mr. Magness testified that the report indicated that the steel industry was unhappy with the level of quality of the No. 2 bundle (Magness dep., Oct. 29, 1965, p. 16). Nowhere in the report is there a suggestion of the possible use by steelmakers of shredded scrap, much less that shredded scrap should be individually compacted so as to produce a fluent mass of pure, dense steel fragments.

Apparently by the time the Battelle report was made the Gregg process used by Los Angeles By-Products Company back in the '30s and '40s was not considered a possible solution.

Luria had been processing scrap metal for 65 years (R. 13) and was the largest scrap processor in the world at the time of Sam Proler's invention (Derlacki dep., Oct. 29, 1965, p. 152). Luria's personnel had talked about fragmentizing automobiles since approximately 1939

and had studied the Los Angeles By-Products Company operation, including the Gregg process, over a period of nearly twenty years. They had discussed and experimented with the possibility of adopting such an operation, or a variation of it, but decided it was not economically feasible (Ralph Ablon dep., pp. 18-36). Luria's personnel surely must be considered "skilled in the art" of processing steel scrap, but compacting of individual pieces of shredded steel did not occur to them.

d) *Commercial Success*

Sam Proler's innovation with its revolutionary new product (as it was called by Dr. Burlingame in his deposition of June 1, 1966 at pages 24, 39) literally transformed the obsolete steel scrap market. The new product was remarkably clean; therefore, metallic yield in the steel mills was increased. Since it was made up of separate individual pieces it could be readily inspected for impurities, whereas inspection of bundles was almost impossible. It was dense enough to please the steelmakers, being more dense than substantially any other type of purchased scrap available. The charging rate of this new product in the steel furnaces was increased. Melting time was reduced. The facility for handling obsolete steel scrap was highly improved in that it no longer took the final form of cumbersome bundles but was rather a flowable or fluent product which could be poured and conveyed on belts. Because of the characteristics of this revolutionary scrap product, power consumption, flux usage, electrode consumption and breakage, slag production, and refractory wear were all reduced, thereby substantially reducing the cost of steelmaking as compared to the cost when using other types of scrap which had previously been

available (Magness dep., Oct. 29, 1965, pp. 101-105; Burlingame dep., June 1, 1966, pp. 30-35).

The success of the patented process was immediately apparent to appellees. After their futile twenty year search for an answer to the problem, they immediately embarked on a program to emulate appellant's process and product. Having appellant's process as a guide, they had little difficulty in beginning construction of their Los Angeles plant in 1962.

Dr. Burlingame, Chief Metallurgist for appellees, admitted that Luria set out to make a product like Proler's and that it would have been very difficult to duplicate it by more conventional means (Burlingame dep., June 1, 1966, pp. 34-35).

Luria found out how difficult it was. In emulating Sam Proler's invention, appellees originally contemplated a three step process (Ex. Q). In order to obtain the dismissal of the declaratory judgment suit in Houston, Mr. Derlacki swore that appellees' plant was completed, that the operation was "highly satisfactory," that they were not employing the individual compacting step (Sam Proler's step 3) and that they had no plans to do so in the foreseeable future (Ex. F). There followed a time during which appellees operated without step 3.

It is now apparent that during this period of time appellees' process was *not* operating satisfactorily as sworn to by Mr. Derlacki. Throughout this period they kept changing grate sizes in their hammer mill (R. 21, 22). They found that when they used small grate openings the product was dense enough, but the equipment would not hold up. When they used large grate openings, the equipment lasted longer, but the product density was too low. There-

fore, scarcely one year after the dismissal of the Houston suit, appellee Luria shut down and began installation of equipment in its Los Angeles plant for returning the larger, lower density pieces to the hammer mill, which Mr. Derlacki had so recently sworn appellee Luria had no intention of doing (Burlingame dep., June 1, 1966, pp. 16-22). Thus appellees tried for a year to produce the product they later called "new and revolutionary" by a non-infringing process, but Luria finally found it was necessary to go to the process which included Sam Proler's third step. In employing the step, Luria individually compacted and balled up the shredded steel pieces by returning them to the hammer mill.

Conclusive evidence of the wide acceptance of the product of the patented process is the fact that in 1957 appellant had only one plant (in Houston) to produce scrap for the steel mills, whereas at the time of the hearing on the summary judgment it had completed plants to practice the patented process in Houston, Los Angeles, Chicago, Kansas City, New York and Boston and had one under construction in London, England. These plants can process, in addition to all other scrap, over one million junk automobiles per year. The product commands a price equal to or better than the best scrap previously available (affidavit of Sam Proler, Ex. B). Additionally, appellees have constructed large plants in Los Angeles, Detroit and Cleveland to carry out the infringing process.

e) Evidence of Long Felt and Unsolved Need

The Battelle Study and Report have previously been discussed. This report, which was co-authored by Mr. Magness, demonstrated the need for a pure, more dense product from obsolete scrap as late as 1957. It further

demonstrated the need for a product easier to handle than the cumbersome No. 2 bundle.

Mr. Magness testified that "it had been recognized for many years, that there had to be a better way of processing scrap than the No. 2 bundle" (Magness dep., Oct. 29, 1965, p. 25).

An undisputed fact in the Record is that the acceptability of the No. 2 bundle (which was the product of obsolete scrap before Sam Proler's invention) was steadily declining (Derlacki dep., Nov. 1, 1965, p. 152; Ralph Ablon dep., pp. 41-43).

The need for a better product from obsolete scrap than the No. 2 bundle was emphasized during World War II when raw materials for making steel were in relatively short supply (Burlingame dep., June 1, 1966, p. 44). Dr. Burlingame further testified that if steel mills in 1940 had been able to obtain an individually compacted and balled up scrap in flowable form, there would have been a ready market for it (Burlingame dep., June 1, 1966, p. 45).

Documentary evidence of the need for an acceptable product made up of obsolete scrap for the steel mills, written in 1935, is in the Gregg patent introduced by appellees (R. 340), wherein it was stated generally that major problems in obsolete scrap were lack of purity, bulkiness in the usual bundle and low density. So in 1935 it was recognized by Gregg that the identical problem subsequently solved by Sam Proler's invention of the patent in suit then existed.

Ralph Ablon, President of Ogden Corporation, the parent of appellees, testified at length to the extreme

measures undertaken by Luria to solve this need. Included in this was the purchase of a large hammer mill which Luria kept in its crates for a long period of time while Luria personnel studied the possibilities of using that mill to produce a satisfactory shredded product. Appellee gave up on that project and that mill was never used for that purpose. Instead, appellees bought a shear in the mid 40's at a cost of *over one million dollars* to cut up automobile bodies in preparation of an obsolete scrap product and, in the words of Mr. Ablon "it didn't work out" (Ralph Ablon dep., pp. 22-24).

Thus the existence of the long felt and unsolved need is amply demonstrated.

f) *The Failure of Others to Solve the Problem*

The Battelle Report of 1957 showed that as of that time the problem had not been solved. Evidence above outlined conclusively shows that Los Angeles By-Products Company and appellee Luria had failed in their attempts to solve this problem.

Thus, as to each of the six fact inquiries stated by the Supreme Court in *Graham v. Deere* to be relevant on the obviousness test, the record contains substantial evidence which is clearly sufficient to raise genuine issues of fact material to patentability under 35 U.S.C. §103.

Surely where a need existed (as it did) for a solution to the obsolete scrap problem, one skilled in the art, having before him the knowledge, tools and equipment available at the time, would have been able to use those tools to create the process of this invention, *if it had been obvious at that time*. But Los Angeles By-Products Company and Luria were both skilled in the

art, and both had knowledge of the same prior art now presented and which was available to Sam Proler. Yet for twenty years or more neither they nor the many others in the field came up with the solution. In *Subtests of "Nonobviousness"* a law review article cited by the Supreme Court in *Graham v. Deere*, the author states: "Existence of the defect creates a demand for its correction, and it is reasonable to infer that the defect would not persist were the solution 'obvious'". 112 U. Pa. L. Rev. 1169, 1172.

In *United States v. Adams*, 383 U.S. 39, 15 L. Ed. 2d 572 (1966) decided the same date as *Graham v. Deere*, the Supreme Court sustained the validity of a patent on a battery which combined old elements. In finding that the invention was not obvious, the court relied in part on the fact that to combine these elements as the patentee did would have required that a person skilled in the art ignore known and accepted factors which would ordinarily deter any investigation into the combination used by the inventor. *Adams, supra* at 51, 52. Similarly, in this case, persons knowledgeable in the art of scrap processing, in order to solve the need, would have had to ignore the fact that in the only known previous attempt to produce a fragmentized scrap for consumption by the steel mills (the Gregg process) it was necessary to make bundles as the end product in order to achieve the necessary density, and that previous attempt had proven an economic failure.

This court has recognized that an accused party's copying of the complainant's invention is evidentiary on non-obviousness. *Troy Company v. Products Research Co.*, 339 F.2d 364, 367 (9th Cir. 1964). After the Derlacki affidavit appellees tried for approximately one year to produce the product called "Lurmet" without sending

the shredded, less dense pieces through the hammer mill to individually compact and ball them up. In April, 1965, however, for economic reasons, they were forced to go to a process which infringed that of the Proler patent. Dr. Burlingame admitted in his deposition that appellees, when they started preparing a new process for producing obsolete steel scrap, intended to come up with a process that was comparable to the Proler process (Burlingame dep., June 1, 1966, pp. 34-35). To assist them in preparing such a comparable process, on February 15, 1961 one of appellees' employees made four pages of sketches (Ex. G) of the plant of appellant in Kansas City, and on January 19, 1962, John L. Crum, an employee of appellee Luria, wrote an extensive report including drawings (Ex. H) on the construction of the Kansas City plant. On March 5, 1962, Mr. Robert R. Young, one of appellee Luria's engineers, wrote to a Mr. Jenkins and requested him to obtain additional information from the Kansas City plant, although he realized that "there may be some reluctance on the part of the operators to divulge information". (Ex. I).

The Supreme Court of the United States in passing on the validity of the patent in the *Adams* case recognized that a factor bearing on the question of obviousness was the fact that experts in the field of that patent had subsequently recognized the significance of the Adams invention, "some even patenting improvements on the same system". *United States v. Adams*, *supra* at 52. To this same effect is *Zegers v. Zegers, Inc.*, 365 F.2d 156, 161 (7th Cir. 1966). Williams Patent Crusher & Pulverizer Company, the company which has built most of the heavy machinery used in the three plants of appellees to practice the process of the patent in suit, in

1966 obtained a patent on a hammer mill designed specifically to accomplish the third step of plaintiff's process, i.e., "individually compacting the ferrous fragments by rolling up the fragments into compact nuggets to increase the product density thereof while maintaining the product in a fluent condition" (Ex. P, column 1, lines 17-20).

In *Zegers* a factor considered by the court in showing the non-obviousness of the invention was the fact that ". . . the evidence does show that the defendant had struggled with the solution to a problem already solved by the plaintiff." *Zegers, supra* at 161. The Record in this case, as outlined above, certainly includes this same factor on non-obviousness.

All this evidence bearing on the non-obviousness of Sam Proler's invention stands uncontroverted in the record.

4. The Court's Findings of Fact and Conclusions of Law on the Defense of Aggregation and Obviousness

The basic finding by the court relating to this defense is number 3, which reads: "Claim 9 of the Proler reissue patent recites nothing more than the known functions of apparatus old in the art." This finding is erroneous on summary judgment because there is at least a genuine issue of material fact on whether claim 9 describes "nothing more than the known function of apparatus old in the art."

Finding 3.1 is immaterial to any finding of invalidity because it refers only to machines which might be used to practice the patented process rather than to the steps of claim 9.

Finding 3.2 is immaterial to any finding of invalidity because it refers only to machines mentioned in the patent

as suitable for use in practicing a preferred embodiment of the patented process. The patent covers a new process, not new equipment.

Finding 3.3 is erroneous in fact in that neither a hammer mill, nor *magnetic* separation, is mentioned in claim 9.

Finding 3.4 is erroneous in fact in that the words "into a suitable storage bin" indicate that the product of the Gregg process might have been left in loose form as a product, whereas the Record is undisputed that the product of the Gregg process always ended in a bale or bundle (Sexton dep., p. 36).

Finding 3.5 is erroneous in fact if it implies that Sam Proler was familiar with rolls "and their function" in individually compacting and balling up shredded ferrous scrap prior to his invention, because there is no evidence of this in the Record.

Finding 3.6 is erroneous in fact in that it states that in the quotation Sam Proler was discussing the function of rolls. To the contrary, he was discussing compacting and balling up his first experimental sample with a hand tamp on the concrete floor. On that same page (171) of his deposition he denies that at that time he had even thought of rolls as a means of practicing that step. He makes it clear that as of that time he only had the idea *generally* of compacting the individual pieces (Proler dep., p. 171).

Finding 3.7 is erroneous in fact because claim 9 does not mention a hammer mill, a magnetic separator, or rolls. Further, there is no evidence in this Record that compacting shredded ferrous fragments was a "known function" of rolls at the time of the invention.

Conclusion of law No. 1, which is intended to relate to appellee's defense of "aggregation" is erroneous in that

(a) there is a genuine issue of material fact on whether claim 9 describes “nothing more than the known functions of apparatus old in the art;”

(b) there is a genuine issue of material fact on whether the third step in claim 9 is old;

(c) there is a genuine issue of material fact on whether the steps in claim 9, in combination, produce a result which is “unexpected, unusual, or surprising” to a person of ordinary skill in the art;

(d) it refers to the equipment which may or may not be used to perform the three steps, rather than to the steps themselves; and

(e) the conclusion misstates the law in that the validity of a process patent does not depend on novelty of equipment, and it ignores 35 U.S.C. §103 on non-obviousness.

There is no conclusion of law to the effect that the invention which is the subject of appellant’s patent was obvious at the time it was made. Further, there are no findings of fact relating to the six subtests of non-obviousness as laid down by the Supreme Court in *Graham v. Deere*.

5. Summary on Aggregation and Obviousness

There are genuine issues of material fact raised by the evidence on

(a) whether step 3 in claim 9 of appellant’s patent is old or new;

(b) whether the process of claim 9 produced a “new, useful, and unexpected result”; and

(c) whether the process of claim 9 as a whole was obvious to one skilled in the art.

Therefore appellees failed to sustain their burden on motion for summary judgment and the judgment of the lower court should be reversed and remanded.

D. THE INFRINGEMENT

Specification of Error No. 2 restated:

The district court erred in holding on summary judgment that appellees' process does not infringe appellant's patent because there was evidence before the court sufficient to raise genuine issues of material fact as to infringement.

1. The Claim at Issue and Appellees' Process

Claim 9 (R. 339) of appellant's process (broken into subparagraphs for clarity) reads as follows:

9. Process of refining a raw ferrous bearing scrap material comprising
 - 1) shredding the raw material,
 - 2) separating the more ferrous bearing shredded material from the less ferrous bearing shredded material, and
 - 3) individually compacting and balling up the pieces of the more ferrous bearing shredded material

to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained.

The claims of the patent provide the concise, formal definition of the invention. It is to these claims that the court must look to determine whether there has been infringement. *Yale Lock Manufacturing Company v. Greenleaf*, 117 U.S. 554, 559, 29 L. Ed. 952 (1886); *Smith v. Snow*, 294 U.S. 1, 11, 79 L. Ed. 721 (1935).

Appellees process the identical raw material described in the patent (Ex. T). This consists of what is known as obsolete scrap, largely made up of old automobile bodies, refrigerators and stoves.

Appellees' process consists of the following (Ex. T):

- 1) shredding the raw material,
- 2) separating the more ferrous bearing shredded material from the less ferrous bearing shredded material, and
- 3) individually compacting and balling up the pieces (up to 45%, Schroeder dep., p. 92) of the more ferrous bearing shredded material

to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained.

Appellees use a hammer mill to shred the material into fragments in step one. They use magnetic drums and hand-picking to separate the ferrous fragments from the non-ferrous material (Derlacki dep., March 28, 1963, pp. 9, 10).

Appellees perform the third step in appellant's process by culling out up to 45 per cent of the shredded fragments, those which are largely sheet steel and which are not com-

pact enough to give the necessary density (Derlacki dep., Nov. 1, 1965, p. 58). These thousands of culled-out pieces are then conveyed to the hammer mill by a conveyor belt and are fed into the hammer mill with the original charging material (Derlacki dep., Nov. 1, 1965, pp. 23-28). These pieces are on the order of six inches to ten inches in size in their largest dimension (Burlingame dep., Oct. 30, 1965, p. 52). When they are introduced into the mill, the action and counter-action of the large, five inch faced hammers (Magness dep., Oct. 29, 1965, p. 71), the sides of the mill, the large, heavy rotor and the bulky original charging material all combine to compact and ball up individually these previously shredded fragments (Ex. T, Sam Proler dep., pp. 26, 28-30).

(Appellees refer to this third step of their process as "recycling." However, this term is misleading in that the fragmented pieces are for the first time put into the hammer mill as *fragments* in this third step (Derlacki dep., Nov. 1, 1965, pp. 23-28.))

2. Evidence of Infringement

This court has held that ordinarily it is up to the jury to determine whether the process used by defendants is identical to or at least equivalent to the process defined by the claim at issue. *Moist Cold Refrigerator, supra* at 255.

There are no special circumstances in this case which will allow taking this fact issue from the jury. On the contrary, the Record contains fact after fact in support of appellant's charge of infringement, far more than necessary to raise a genuine issue of material fact.

Appellees admit that they perform the first two steps of the process (Derlacki dep., March 28, 1963, pp.

9, 10). Thus the only controversy is as to the third step. The following are examples of the evidence in the Record showing (a) that the appellees found it necessary to employ step 3 of Claim 9, i.e., compacting and balling up the individual pieces of fragments in order to achieve sufficient density, and (b) that they achieve this result by sending these fragments through the same hammer mill which they use to shred the car bodies, stoves and refrigerators into fragments:

1) Dr. Burlingame, Luria's Chief Metallurgist, admitted that the third step was needed in order for appellees to produce a satisfactory product (Burlingame dep., p. 22);

2) Mr. Magness, Luria's Vice-President in charge of this operation, admitted in writing to Bethlehem Steel the necessity and purpose of the "recycling" operation by remarking "Due to necessity of recycling in order to produce final product" (Ex. N);

3) Robert R. Young, appellee Luria's Engineer, admitted in writing, based on his personal observation of the action of a hammer mill on shredded steel fragments, that such fragments when run through a hammer mill were reduced to "tightly compacted nuggets" (Ex. D);

4) Luria admitted in an interoffice memo (Ex. M) covering the Luria pilot plant operation at Williams Patent Crusher & Pulverizer Company in St. Louis, consisting of a hammer mill for shredding, a magnetic separator, and a second hammer mill for compacting, that the hammer mill called "nuggetizer" was used to compact and ball up the shredded pieces as follows:

“After a vibrating conveyor has removed the material from the fragmentizer, it passes through a magnetic separating stage where the non-metals are removed. Then the next stage conveyor takes this to a nuggetizer. *The function of the nuggetizer is not to further shred the product but to compact it and reduce its size. Basically, this is taking a piece and trying to fold it up into a smaller piece which increases density and improves its conveying and handling properties.*” (Emphasis added)

The “nuggetizer” referred to in the above memorandum was a hammer mill (Burlingame dep., June 1, 1966, pp. 13, 14);

5) Mr. Magness referred in writing to Luria’s “new scrap processing method” for producing “nuggetized scrap of consistently higher physical and chemical quality than currently available grades of scrap.” He further equated “recycling” the material in the hammer mill with the use of a “nuggetizer” (hammer mill) when he stated, “Install first half of processing line capable of fragmentizing material at design rates *and capable of acting as nuggetizer by recycling material.*” (Ex. N) (Emphasis added);

6) Dr. Burlingame admitted on deposition that his superiors had told him not to use the terms “compacting” or “balling up” (the terms used in claim 9) as descriptive of what happened to the shredded scrap fragments when they were sent through the hammer mill (Burlingame dep., June 1, 1966, p. 37);

7) Luria released a photograph of a workman holding up a piece of its product which was advertised as “compact.” The photograph shows that appellees’ advertising was accurate (Ex. S);

8) the affidavit by Dr. Hassialis, appellees' expert, in connection with their motion for summary judgment does not even mention whether there is compacting or balling up (substantial or otherwise) of the shredded pieces when they are sent through the hammer mill (R. 345-359);

9) the affidavit of appellant's expert, Dr. Pennington, however, states that his examination of appellees' product showed a substantial amount of the pieces compacted and balled up (Ex. T);

10) both Mr. Magness and Dr. Burlingame admitted on deposition that there was some compacting of the shredded steel fragments which were sent through appellees' hammer mill (Burlingame dep., June 1, 1966, pp. 26-27; Magness dep., Oct. 29, 1965, p. 77);

11) in the district court appellees filed three briefs. In none of them do they deny that there is compacting and balling up of the shredded fragments run through the hammer mill;

12) Mr. Williams, who designed and built most of appellees' equipment used in the process, obtained a patent in November, 1966 (Ex. P) on a hammer mill in which he described the action of that hammer mill on shredded ferrous scrap as "individually compacting the ferrous fragments by rolling up the fragments into compact nuggets to increase the product density thereof while maintaining the product in a fluent condition." (The similarity of the language in claim 9 of the Proler patent and that in the later Williams patent is striking.);

13) Luria's Research and Planning Division anticipated compaction in a hammer mill which they originally planned to use as a "nuggetizer," as follows: "The next step (the third step) involves further reduction of the ferrous fragments and their compaction in the Nuggetizer." (Ex. Q) (Comment in parentheses added.);

14) Sam Proler, appellant's President, who has been in the scrap business all his life, and who has had much experience with hammer mills, testified that there are numerous ways to accomplish the third step of claim 9 of the Proler patent. He testified unequivocally that one way would be to send the shredded fragments through a hammer mill, either the same one used for shredding the car bodies, stoves and refrigerators, or another one (Proler dep., pp. 26, 28, 29). Mr. Proler testified as follows:

"I would say the pieces that have been through the shredder one time and shredded, when you run them through one time again, it is balled up, beat up, crumpled up and made smaller more dense, because when you put the car, the refrigerator or stove, or whatever you are shredding with it that goes through, these pieces are small enough to get beat up, balled up and crumpled up, as they are already small pieces, and I would say there is no such subdividing or tearing action as such, but a balling up and individually compacting the pieces that fall back through the hammer mill in a smaller more dense size." Proler dep., *supra* at 30.

15) The fact that appellee Luria filed the Derlacki affidavit to obtain the dismissal of the declara-

tory judgment suit in Houston, and stated therein that they were not "recycling" the shredded pieces and had no plans to do so, or to "compact the individual particles of the product in the foreseeable future" was an admission that if they did "recycle" the pieces they would infringe (Ex. F).

The foregoing evidence shows the need found by appellees for the third step in their process. This evidence further raises a genuine issue of material fact whether in that third step appellees, when they send the shredded fragments through their hammer mill, achieve the individual compacting and balling up of those fragments to densify them, while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained. It was error to decide this issue on summary judgment, since it was clearly a fact issue for determination by the jury.

Appellee's statement that they do not use rolls to accomplish the third step of claim 9 is beside the point because the courts have consistently held infringement of a method patent is not dependent on the form of the apparatus used. *Smith v. Snow, supra*; *Binks Manufacturing Company v. Ransburg Electro-Coating Corporation*, 281 F.2d 252, 258 (7th Cir. 1960).

As stated by the Ninth Circuit Court in *Kemart Corp. v. Printing Arts Research Laboratories*, 201 F.2d 624, 629 (9th Cir. 1953): "The test of identity or equivalence of two processes is not the apparatus or materials used but whether they involve identical or equivalent steps." On this same subject, the Supreme Court in *Cochrane* held that it is the step in the process which is important, not the means used to achieve that step:

“If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar or a mill. Either may be pointed out; *but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the same.* A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.” *Cochrane, supra* at 787 (Emphasis supplied.)

Claim 9 of the patent in suit does not call for rolls to perform the third step, although other claims in the patent, not in issue, do so. The limitation of those other claims should not be read into this claim. *Stearns v. Tinker & Rasor*, 252 F.2d 589, 597 (9th Cir. 1957).

The allegation by appellees that in their third step they merely “subdivide” the shredded pieces is without merit in that it is contrary to what their own people have said from personal observation regarding the action of a hammer mill on shredded fragments (Ex. D, for one example). This alone is enough to raise a fact issue. Appellees seek to rely on the affidavit of Dr. Hassialis for this allegation, but their own expert’s affidavit, written expressly for this motion for summary judgment, fails to support them. First, it doesn’t even inform the court whether or not the fragments are compacted and balled up in appellees’ third step. Further, it fails to advise the court whether or not most of the additional pieces which Dr. Hassialis counted were merely small chips knocked off the larger fragments, leaving the latter substantially intact and compacted.

The fragment pictured in Exhibit S (claimed by appellees in their advertising to be representative) is not only intact, but is obviously compact and balled up.

Appellees' allegation that if some "subdivision" takes place in their third step, they do not, within the meaning of claim 9 "maintain the individuality of the separate pieces" is unsupported by the evidence.

Appellees maintain "the individuality of the separate pieces" within the meaning of that language as used in claim 9. Consideration of the history of prosecution of the applications which resulted in this patent makes it clear that language was added to the claims solely for the purpose of distinguishing over the prior art baling or bundling operations. The language was first used in claim 7 of application serial No. 677,514 (R. 383). When that claim was added, appellant's attorney who was prosecuting the application pointed out to the Patent Office that one of the novel features was: "The compacting of the pure concentrated material without destroying its fluent state." (R. 384). It was then pointed out that the compacting operation defined by the claims differs from those of the prior art Westberg and Gregg patents in that each of those compacted their material into solid bundles or bales. (R. 386) Therefore, it is baling or bundling, or other operations which cause separate pieces to adhere together, which are excluded, and not operations which may also include some subdivision.

The law in this circuit is to the effect that it is up to the trier of fact, in this case the jury, to decide how a term in a claim should be interpreted. *Moist Cold Refrigerator, supra* at 255, 256. It is submitted that the foregoing evidence makes it clear that at least a genuine issue

of material fact exists as to the meaning of the term "maintaining the individuality of the separate pieces," as used in claim 9.

Further, the claims of a patent are not to be construed with legalistic rigidity. ". . . a patentee has the right to use such words as to him best describe his intention, and they will be so construed as to effectuate that result." *Bianchi v. Barili*, 168 F.2d 793, 799 (9th Cir. 1948).

Although appellees do not deny the evidence in the case on infringement, and despite the many statements of their personnel to the effect that the infringing process and the product thereof are new and revolutionary in the art of scrap processing, they contended in the court below that in sending the shredded steel fragments through the hammer mill they were merely "recycling" as had been done in the past. For this, however, they rely only on the textbooks referred to in Dr. Hassialis' affidavit (R. 345-359). These texts are not in point because they deal only with processes for treating rock or other brittle materials. As pointed out by Dr. Pennington in his affidavit these texts nowhere deal with the processing of shredded fragments, largely made up of sheet steel, or any material remotely similar thereto. Further, there is no mention in the texts of producing "a fragmentized product of a particular density." (Ex. T).

Back in 1963 when appellant brought its suit for declaratory judgment against appellee Luria, Luria's personnel had no hesitancy in admitting that if they put shredded fragments into their hammer mill it would be for the purpose of obtaining a higher density (Derlacki dep., March 28, 1963, pp. 73, 74; Magness dep., March 28, 1963, pp. 31, 32). Later, in order to obtain a dismissal of the declaratory judgment suit, Mr. Derlacki

swore in February, 1964, that appellee Luria had no plans "to recycle any of its product or to compact the individual particles of the product in the foreseeable future."

In April, 1965, however, appellees were obviously forced to add the third step, which they had originally contemplated. The present action followed and thereafter appellees sought some reason to excuse their change to a process which Mr. Derlacki had sworn they had no intention of using. It was then that for the first time they had brought to their attention the textbooks on machinery for processing rock and ore (R. 349-359, and Derlacki dep., Nov. 1, 1965, pp. 96-97). They decided that henceforth they would seek to use these texts to excuse sending the shredded fragments through the hammer mill as a mere efficiency step.

3. The District Court's Findings of Fact and Conclusions of Law on Infringement

The basic finding of fact upon appellees' defense of non-infringement is number 4: "Defendants' accused process does not infringe claim 9 of the Proler reissue patent." This finding is erroneous on summary judgment because a genuine issue of material fact exists on whether appellees' process infringes claim 9.

The subsidiary findings to number 4 are 4.1 through 4.8.

Findings 4.1 and 4.2 are not material to support a finding of no infringement. They are material only to show the unsuccessful efforts by appellees to avoid infringement, after the declaratory judgment suit had been dismissed on the basis of the Derlacki affidavit.

Finding 4.3 is erroneous because it is contrary to the evidence, insofar as it purports to find that appellees after April, 1965, produced Lurmet in the same density range as *all* of the product made before April, 1965. The Record is clear that when Luria produced the product *before* April, 1965, with grate openings comparable to what they now use, it was unable to produce a product of sufficient density to satisfy its customers (Burlingame dep., June 1, 1966, pp. 16-17).

Finding 4.4 is erroneous because it misstates appellant's charge of infringement when it refers to "the function" of the hammer mill and "the function" of the rolls. Appellant charges that the action of the hammer mill on the previously shredded steel fragments is that of "individually compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces." The same result may be obtained in this step by the use of rolls, by hand tamping, or by countless other means which could be employed (Sam Proler's dep., pp. 167-172).

Finding 4.5 is erroneous because it is vague and indefinite. It refers to "material" fragmentized and "recycled" in a hammer mill. If "material" is intended to refer to shredded scrap fragments, it is erroneous, because there is no evidence in the Record of such a prior use. If it is not intended to refer to shredded scrap fragments, it is immaterial.

Finding 4.6 is erroneous because it is immaterial. A process claim may not be limited to equipment disclosed as useful in performing the steps of the claim.

Finding 4.7 is erroneous because:

a) it includes a finding that appellees' hammer mill shreds and subdivides the shredded fragments when they are fed into it, whereas there is a genuine issue of material fact on this, in that there is evidence that appellees' hammer mill individually compacts and balls up the shredded fragments when they are processed through it in the third step;

b) it includes a finding that "while maintaining the individuality of the separate pieces" as used in claim 9 was intended to exclude any subdivision of the shredded pieces, whereas there is a genuine issue of material fact on this, in that there is evidence from the file history that the words "while maintaining the individuality of the separate pieces" as used in claim 9 were intended to exclude any baling or bundling operation, whereby the pieces would be rendered adherent to one another rather than free and individual; and

c) it refers to the "function of the rolls" in the patent, whereas claim 9 is not in any way limited to the use of rolls for performing the third step.

Finding 4.8 is erroneous in fact. While Sam Proler did not deny there might be some incidental subdivision of the previously shredded fragments when processed in the hammer mill in appellees' third step, his testimony was that the effect of so processing those fragments was to individually compact and ball them up (Sam Proler's dep., pp. 26, 28-30).

Sam Proler clearly differentiated step 1 of appellees' process, wherein whole automobile bodies, stoves and refrigerators are hit by the five inch wide hammers and shredded into fragments (Sam Proler's dep., p. 43) and

step 3 of appellees' process, whereby the shredded fragments, six inches to ten inches in their largest dimension, are processed through the hammer mill and subjected to the five inch wide hammers (Sam Proler's dep., pp. 26, 28-30).

Conclusion of law 2 is erroneous on summary judgment, because it assumes that there is only shredding of the ferrous scrap fragments when they are run through appellees' hammer mill, whereas appellant presented ample evidence to the contrary. The Record presents a material issue of fact on this.

Conclusion of law 2 is factually erroneous in stating that rolls are described in the third step of claim 9, because they simply are not.

Conclusion of law 2 is erroneous as a matter of law because it compares the equipment used in appellees' process with the equipment used in appellant's commercial process rather than comparing appellees' process with the process of claim 9.

Conclusion of law 2 is erroneous in that by implication it concludes that the words "while maintaining the individuality of the separate pieces" as used in Claim 9 of Appellant's patent were intended to exclude subdivision of the pieces, whereas there is a genuine issue of material fact on this, in that the file history shows the language was intended to exclude a baling or bundling operation.

Conclusion of law 3 is erroneous because it describes the language of claim 9 as "functional" when no evidence whatsoever on this point has been presented to the court.

Conclusion of law 3 is further erroneous as a matter of law because 35 U.S.C. § 112 does not limit the cover-

age of a step in a process claim to the *equipment* disclosed in the specification or equivalents thereof.

Conclusion of law 3 is further erroneous in that at least a genuine issue of material fact is raised on infringement.

Conclusion of law 3 is further erroneous in that it finds by implication that the shredded fragments are sent through the hammer mill "for further shredding and subdivision," whereas there is a genuine issue of material fact on whether the fragmented pieces are sent through the hammer mill for individually compacting and balling them up, while maintaining their individuality, whereby a fluent mass is obtained.

4. Summary on Infringement

It is indisputable in this case that appellees studied appellant's patent and process and determined to copy it. At first appellees intended to have a three-step process, in which a hammer mill would be used to shred the obsolete scrap, magnetic drums would be used to separate the ferrous fragments from the non-ferrous material, and a second hammer mill (termed a "nuggetizer") would be used to individually compact and ball up the shredded steel fragments (Ex. Q). In an effort to conceal their infringement, they decided to omit what Dr. Burlingame called the "discrete" piece of equipment, which was a second hammer mill (Burlingame dep., June 1, 1966, p. 36), for performing step 3. They contemplated instead resorting to the more devious method of processing up to 45 per cent of the shredded fragments in the same hammer mill which they used to shred the original charging material.

They were delayed in inaugurating this third step by the fact that Mr. Derlacki, in order to get the declaratory judgment suit dismissed in Houston, had sworn on February 18, 1964, that they would not employ it.

As has heretofore been shown, however, a little over one year after Mr. Derlacki's affidavit appellees found it economically undesirable to continue without the third step and decided to risk this patent infringement suit by putting the third step of claim 9 in their operation.

E. THE INVENTION CLAIMED BY THE REISSUE

Specification of Error No. 3 restated:

The district court erred in holding on summary judgment that the Proler reissue patent was invalid as not claiming the invention disclosed in the original patent for the reason that there was evidence before the court sufficient to raise genuine issues of material fact as to this defense.

Appellant's original patent No. 2,943,930 was issued on July 5, 1960. (R. 338) All of the claims of that patent specified at least two different operations for accomplishing the step of separating the ferrous fragments from the non-ferrous materials. In each claim roasting was mentioned as a way to accomplish that step.

Shortly after the original patent issued, it was realized that the claims would not clearly read on all of the known ways of purifying, or separating the ferrous materials from the non-ferrous materials, and that it would be necessary to reissue the patent with claims in which the purifying operation was more broadly defined (R. 495). Thus on

December 5, 1960, Mr. Proler applied for a reissue of that patent (R. 484). He filed an oath (R. 495) in which he stated that, through error, the original patent did not include claims broad enough to provide full protection to the invention, setting forth the nature of the error. This application was granted, and the patent in suit, Reissue patent No. Re. 25,034, was issued on August 29, 1961. The only difference between the original and the reissue patents is the addition of claim 9 and claim 10 in the reissue patent which do not specify roasting as a way to achieve the purifying step. (R. 339).

In considering the validity of this reissue patent, certain provisions of the statute are pertinent:

“Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall . . . reissue the patent for the invention disclosed in the original patent” 35 U.S.C. § 251.

Appellees do not deny that the original patent was “partly inoperative . . . by reason of the patentee claiming . . . less than he had a right to claim in the patent” 35 U.S.C. § 251. Appellees’ allegation that claim 9 of the reissue patent is invalid because the invention claimed therein is not “the invention disclosed in the original Proler patent” (R. 282), was not established in the court below.

From the reissuance of a patent it is to be presumed that the law was complied with, and the decision of the Commissioner of Patents in this regard will not be re-

viewed "unless the matter is manifest from the record." *National Nut Co. v. Sontag Chain Stores Co.*, 107 F.2d 318, 330 (9th Cir. 1939), *rev'd on other grounds*, 301 U.S. 281, 84 L. Ed. 1204 (1940); *Topliff v. Topliff*, 145 U.S. 156, 171, 36 L. Ed. 658 (1891).

In *Topliff*, the Supreme Court approved a reissue claim in which one element had been omitted and another one added, stating that the reissue statute is to be liberally construed, "to secure to inventors a monopoly of what they have actually invented or discovered" *Topliff, supra* at 171.

In considering whether reissue patent claims are merely a broadening of the original claims as opposed to claims for a different invention, it should be kept in mind that

"there is a distinction well marked between reissues broadening the claims of the original, but confined to the invention therein exhibited, which the courts sustain, and reissues that depart from the invention exhibited in the original and included under its statement of invention". *National Nut v. Sontag, supra*, at 331.

In the case of *Handel, infra*, the Court of Customs and Patent Appeals in 1963 held:

"The whole purpose of the statute, so far as claims are concerned, is to permit limitations to be added to claims that are too broad or to be taken from claims that are too narrow. That is what the statute means in referring to 'claiming more or less than he had a right to claim'." (Emphasis Added) *Application of Handel*, 312 F.2d 943, 948 (C.C.P.A. 1963).

That court further stated in *Handel* that it was improper to look at the *claims* of the original patent to see

what the applicant intended to cover, since such claims are necessarily more limited. The court stated that the intent should be determined from the *specification* of the original patent, and particularly the *statement of objects of the invention*.

The Second Circuit Court of Appeals described in considerable detail the type of information which must be considered in determining whether the reissue claims are for the invention disclosed in the original patent. *Monogram Mfg. Co. v. Glemby Co.*, 136 F.2d 961 (2nd Cir. 1943). In *Monogram*, the court considered that it was material that (1) the originally stated *objects of the invention* made no reference to the particular element which was omitted in the reissue claims, that (2) the original specification stated that the *embodiment shown* in the drawings and described therein was a *preferred embodiment* of the inventive idea, that (3) the specification further stated that it was *not desired to be limited to the particular forms described and illustrated* since many changes and modifications might be made without departing from the spirit or scope of the invention; and that (4) the *prior art showed the specific element which was omitted* from the broadened claims. *Monogram v. Glemby, supra* at 963.

Every one of these facts was before the court in the present case:

(1) The paragraph of the patent which briefly describes the invention does not limit the invention to a roasting operation:

“This invention pertains to refined scrap and a method of making same; more particularly it pertains to a process of upgrading contaminated ferrous

scrap to make a product more suitable for charging directly or indirectly into a furnace for making iron or steel such as an open-hearth furnace, blast furnace, electric furnace, cupola type furnace, for example.” (Col. 1, lines 15-21. R. 338)

The objects of the invention are stated as follows:

“A particular object of the invention is to convert material heretofore suitable only for making what is known in the trade as a number 2 or number 3 scrap bale into a material equivalent or superior to a number 1 bale of scrap.

“A further object of the invention is to effect such a conversion at a cost that is low enough to effect an overall saving in the cost of steel production compared to the use of number 1 scrap bales.

“A further object of the invention is to produce a flowable material, analogous to graded hard coal or rock, which can readily be handled by conventional continuous conveyors such as augers or buckets or belts, as distinguished from unitized bales requiring individual handling.” (Col. 1, lines 23-36. R. 338)

Neither roasting, nor a product which has been roasted, is referred to in either the portion briefly describing the invention or the objects of the invention.

(2) The original specification makes it clear that the specific embodiment of the invention described and shown in the drawings is not the only possible form of the invention. Note that a “preferred method embodying the invention” is described. (col. 1, line 40. R. 338) It is apparent that it was not there intended to limit the invention to only the preferred method.

Note also that Figures 1A and 1B are stated to constitute "a semi-schematic layout of apparatus *suitable* for carrying out the method of the invention". (col. 1, lines 57-59. R. 338) (Emphasis added.) This places no limit on this specific apparatus to perform the method of the invention.

Then, as shown in column 1, lines 62 and 63, it is "the apparatus there shown" in Figure 1 (apparatus "suitable" for carrying out the method) which is described. The statute says that the specification "shall set forth the *best* mode contemplated by the inventor of carrying out his invention". 35 U.S.C. § 112 (Emphasis added) There is no requirement that *every* mode of carrying out the invention be set forth. Such a requirement would, of course, be impossible of compliance. *Smith v. Snow*, *supra* at 11; *Pursche v. Atlas Scraper and Engineering Co.*, 300 F.2d 467, 479 (9th Cir. 1961). Thus, the description there given is only of the preferred apparatus shown in the drawing and its operation upon the raw material.

(3) In column 3, lines 44 to 47 of the patent, it is stated:

"While a *preferred* embodiment of the invention has been shown and described, many modifications thereof can be made by one skilled in the art without departing from the spirit of the invention . . ." (Emphasis added).

(4) Roasting was known in the prior art, as exemplified by the Brooke patent (Ex. U), and by the fact that after the Brooke patent was cited by the Patent Office (R. 440) Mr. Proler never tried to use roasting as a distinction over the prior art.

(5) The product resulting from the process is fully described in the original patent as one made from a suitable raw material, as previously described in the patent, and which is reduced to pieces *substantially free of non-ferrous materials*, and which has a high density, and therefore is suitable for charging to all types of steel furnaces. (col. 3, lines 19-43, R. 339) It was not stated that it must have been roasted to free it of non-ferrous materials.

From the foregoing, it is apparent that the basic concept of this invention is a process for deriving a clean, high density, flowable scrap material from old automobiles and the like. This is expressed in the objects of the invention and in the stated result of the practice of the process of the invention. Roasting is referred to only in discussing a *preferred* method and *one* embodiment of apparatus suitable for practicing the method. Thus the patent meets every fact test laid down in *Monogram v. Glemby, supra*.

It is apparent from the foregoing that there is substantial evidence in the Record supporting appellant's contention that the reissue claim is for the invention disclosed in and intended to be protected by the original patent and that, therefore, the district court was in error in granting summary judgment on this ground.

Appellees rely primarily on the decision of the United States Supreme Court in *U. S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corporation*, 315 U.S. 668, 86 L.Ed. 1105 (1942). In that case (*which was decided after a full trial and not on summary judgment*), the Supreme Court held a reissue patent invalid as being for a different invention for the reason that the re-

issue did not describe and claim the invention intended to be secured by the original patent.

But the present case is readily distinguishable on its facts. In *Industrial Chemicals* the original patent had described and claimed a process for making ethylene oxide by subjecting ethylene to the simultaneous action of oxygen and water in the presence of a catalyst. The original patent specification stated that the presence of water reduced the production of undesirable side-products. In the reissue patent, however, the specification was completely rewritten, and all previous references to water were removed, with the statement being added that water might be used for a completely different purpose, i.e., to reduce the temperature of the zone of reaction.

In its determination of whether the invention claimed in the reissue was originally intended to be secured, the Supreme Court considered as material the facts that (1) the objects of the invention in the original specification had recited the use of water; (2) the specification was rewritten to eliminate the previous reference to water; (3) that insofar as one skilled in the art could tell from reading the original specification, the process there described could not be practiced without the introduction of water; and (4) that the evidence showed the discovery that the process would work without the addition of water was not made until after the patent issued. *Industrial Chemicals, supra* at 672-677.

It is apparent that the reissue patent of the present case is not afflicted with *any* of the defects of that of the *Industrial Chemicals* case:

(1) The objects of the invention as originally set forth in the specification still apply, without any modification, to the reissue claims.

(2) The specification was not rewritten to eliminate the previous reference to roasting, or to change the stated purpose for roasting.

(3) One skilled in the art, reading the original specification, would recognize that the process there described could be practiced without any roasting operation. In Sam Proler's original conception, and in his first trial run of the process, he did not include roasting (Sam Proler deposition, pp. 167-170). The original disclosure sets forth four different ways of separating non-ferrous material from ferrous material, and Mr. Derlacki noted, *before the patent was reissued*, that these were only "four out of the six key steps for separating ferrous scrap from trash and non-ferrous metallics" (Ex. X).

(4) There is no evidence in the Record that the fact that the process could be performed without roasting was not known and recognized when the original application was filed. As just noted, Mr. Proler, the inventor, recognized it.

Thus, *under the authority relied on by appellees*, it is apparent that there is substantial evidence in the Record raising a genuine issue of material fact on the question of whether claim 9 is for the invention originally disclosed.

Before the Brooke patent was cited, showing that roasting was old, counsel for the patentee argued to the Patent Office that roasting of the shredded scrap was one of two distinctions over the prior art, the other being the individual compacting step. Appellees contend that these arguments by counsel are evidence that the roasting operation was considered to be essential in the original application. Neither the law nor the Record supports this con-

tention. In the present case, Sam Proler's attorney argued at length that there were *two* distinctions over the prior art, but *no claims were ever allowed as a result of these arguments* (R. 440-442). After the Brooke patent was cited, the attorney quit arguing about roasting, which was disclosed by Brooke, and concentrated on the "compacting" distinction. It was only then that claims were allowed.

Thus the roasting operation, which was *not* relied on to obtain allowance of the patent claims, was well known in the art, and was not even a factor in the granting of the patent.

It has therefore been shown that there is evidence in the Record providing substantial support for the finding of the Commissioner of Patents. The evidence clearly is to the effect that the original specification disclosed a process in which the purification of the material could be performed in a number of ways, all of which were old, and that neither the performance nor the patentability of the process depended on the use of any particular type of purifying.

This Court held in *Hycon* that the fact that all the evidence is documentary does not do away with the necessity of deciding fact issues and that ". . . any tendency to abolish trial in patent cases for consideration of documents in camera should be curbed." *Hycon, supra* at 356.

The Sixth Circuit Court of Appeals agrees. In *Hartzell Industries, infra*, it held that the question of whether the reissue claims were to something other than "the invention disclosed in the original patent" was a factual question:

"On this appeal, defendant urges us to make such findings by examining the specifications, the draw-

ings, the claims and the oath of the inventor, all a part of the application for the reissue patent. It is not our function to do so. The taking of testimony will undoubtedly be necessary to resolve such factual questions.” *Hartzell Industries, Inc. v. McCauley Industrial Corporation*, 304 F.2d 481, 484 (6th Cir. 1962).

Consequently, it is apparent that the district court erred in adjudging the patent invalid on this ground on summary judgment.

The district court also erred in its findings of fact and conclusions of law made ostensibly to support its judgment on this ground.

Finding of fact 2.2 is erroneous in fact in that it does not set forth the process described in the patent, but instead it recites, in substance, the “preferred method” noted in column 1, lines 39 to 47, of the patent (R. 338), adding thereto the specific pieces of equipment described in the patent as being suitable for carrying out the process of the invention.

Finding 2.3 is immaterial in that the arguments made by counsel referred to therein were not ultimately relied upon by the patentee to obtain the claims of the original patent or by the Commissioner in allowing those claims.

Finding 2.4 is immaterial because one does not look to the claims of the original patent to determine if the reissue claims cover an invention disclosed originally. The reissue claims are necessarily broader; otherwise, the reissue statute would be of little or no practical value. *Application of Handel, supra* at 948.

Conclusion of Law 4 is erroneous for the reason, as has heretofore been shown in detail, that there are genuine issues of fact material to the question of whether claim 9 covers an invention disclosed in the original patent.

F. THE ERROR IN FAILING TO CLAIM BROADLY

Specification of Error No. 4 restated:

The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent was invalid on the ground that the defect of the original Proler patent did not arise through error because there was evidence before the court sufficient to raise genuine issues of material fact as to this defense.

Appellees' allegation that there was no "error" within the meaning of 35 U.S.C. §251, was not established by them in the court below.

The record clearly shows that the error was in failing to claim the invention as broadly as the inventor was entitled.

Appellees misconceive the meaning of the term "through error without any deceptive intention" as has clearly been defined by the courts. The courts have consistently held that *the failure of the patentee to claim his invention as broadly as he was entitled* is such error as will justify the reissue of the patent with broader claims which will cover the invention. In this regard, this court stated in *National Nut* as follows:

"On the question of 'inadvertence or mistake'* we quote from our decision in *Perfection Disappearing Bed Co. v. Murphy Wall Bed Co.*, supra, 266 F. at page 699:

"From the foregoing decision and others it is obvious that the words 'inadvertence or mistake' are used in the statute as the antithesis to 'fraudulent intent,' and that *in the absence of fraud the failure of an inventor or his solicitor to put the claims in such form as will cover the entire invention is 'inadvertence,'* within the meaning of the statute, and that to justify a reissue it is not necessary that the original patent shall be inoperative, but it is sufficient if it fails to secure to the patentee the whole of his invention'." (Emphasis added) *National Nut v. Sontag*, supra at 330.

Appellees have presented no evidence of any fraudulent intent on the part of appellant. In this regard the Seventh Circuit Court of Appeals found, in *Hazeltine Research*, infra, that there had been error in accepting claims which were too narrow, noting that there was no evidence of any intention to deceive and that: "Deceptive intention, like fraud, is never presumed." *Hazeltine Research v. Avco Manufacturing Corporation*, 227 F.2d 137, 144 (7th Cir. 1955). Also relevant on this point is the statement of the Eighth Circuit Court of Appeals as follows:

"Mistake, as used in this statute, may cover any sort of misconception or misapprehension. As said in *Motion Picture Patents Co. v. Laemmle*, D.C. N.Y., 214 F. 787, 794, 'It is far from simple to fix

* As appellees have stated, the language "inadvertence or mistake" is construed as having the same meaning as the present statutory term "error without any deceptive intention."

on phraseology for patent specifications and claims which will successfully resist attack, and where, as here, there was no fraud or deceptive intention, and the patentee claimed more as new than he was entitled to, such error was clearly due to that inadvertence, accident, or mistake in respect of which the statute was intended to afford relief." *Freeman v. Altvater*, 138 F.2d 854, 858 (8th Cir. 1943).

The Court of Customs and Patent Appeals has held that the question of whether an error occurred is a fact issue:

"We find as a factual matter that a mistake occurred in the prosecution of the patent application. That mistake was in not then presenting the appealed claims with the result that appellant's patent claimed less than he had the right to claim." *In re Wesseler*, 367 F.2d 838, 850 (C.C.P.A. 1966).

There is substantial evidence that the patentee originally claimed less than he was entitled to claim. Roasting was old, as shown, for example, by the Brooke patent (Ex. U), and was not relied upon by the Patent Office as distinguishing the invention from the prior art. Note that the last argument to the Patent Office which resulted in the allowance of the original patent claims relies solely on the individual compacting to distinguish over the prior art. (R. 466-473). Thus the recitation of roasting in all the original claims was an unnecessary limitation. The claims would have been allowable and would have been broader without roasting. Therefore, the attorney for Sam Proler claimed less than he was entitled to claim in the original patent. His failure to claim more broadly, by defining the separating or purifying step more broadly,

was error of the precise type referred to in the above-cited cases.

It is evident from the Record before the court that there is at least a genuine issue of material fact as to whether there was error as contemplated by the law. Actually the evidence is overwhelmingly in appellant's favor on this point. The presumption of validity which applies to patents in general applies to reissue patents as well, *Hartzell v. McCauley, supra* at 484, and the court may not review the decision of the Commissioner of Patents upon the question of inadvertence, accident or mistake unless the matter is manifest from the record. *Topliff v. Topliff, supra* at 664. The Ninth Circuit has consistently followed this rule, stating, that "from the reissuance of a patent it is to be presumed that the law was complied with." *National Nut v. Sontag, supra* at 330.

The reissue statute is to be liberally construed, and the court must assume that the Commissioner found the facts relative to inadvertence, accident or mistake in favor of the applicant unless there is an entire absence of evidence to support the commissioner's action. *Freeman v. Altvater, supra* at 859, and *Sbicca-Del Mac v. Milius Shoe Co.*, 145 F.2d 389, 396 (8th Cir. 1944).

With respect to this allegation the District Court found in its conclusion of law 5 that the reissue patent is invalid "in that the defect of the original Proler patent did not arise through error". From the foregoing it is apparent that this conclusion is erroneous as a matter of law and is not supported by the evidence, and at the very least there is a genuine issue of fact material to the question.

G. SUFFICIENCY OF THE OATH

Specification of Error No. 5 restated:

The district court erred in holding on summary judgment that claim 9 of the Proler reissue patent is invalid on the ground that the oath filed with the application for reissue fails to show any error because there is no evidence to support this, or alternatively, there was sufficient evidence before the court to raise genuine issues of material fact thereon, and on whether the Commissioner had sufficient evidence of error before him from the file record to determine there was error within the meaning of 35 U.S.C. §251.

Appellees' allegation that the reissue oath did not specify the error is astounding in light of the fact that the oath itself (R. 495) shows on its face that the error was the failure of the applicant's counsel to include in the original patent "claims broad enough to provide full protection to the invention." This describes precisely the type of error which the courts have held to be required under the statute. *National Nut v. Sontag, supra*; *Hazeltine v. Avco, supra*.

Furthermore, the oath set forth the precise nature of the error which was relied upon:

"Deponent further deposes and says that *the failure to include claims broad enough to properly protect the invention* arose through error and without any deceptive intention. . . ." (R. 495) (Emphasis added.)

"*The error in failing to include claims broadly defining the purifying step* arose during the prosecu-

tion of the application for the patent. . . ." (R. 496) (Emphasis added.)

In addition, the oath described in detail exactly how the claims of the original patent failed to fully protect the invention:

"All claims in the patent well cover a preferred embodiment of the invention, however the principal advantages of the invention may be obtained by imperfectly practicing the invention in such a way as may be construed to be outside the scope of the claims.

"All the claims of the patent are broadly directed to a process which comprises the steps of sizing the material, purifying the material, and compacting the material. In reviewing the claims, and comparing them with the prior art, it is noted that the purifying step should be defined more broadly. Although the preferred embodiment of the invention, as is described in the specification, includes for the purifying step the operations of magnetic separation, hand picking, roasting, and trommeling, the invention could be practiced, albeit with less than optimum results, by using less than all four of these operations, or by modification of some of these operations. It is desired by this reissue to include claims of the scope of claims 1 (sic), 10, 11, and 12, which would clearly cover such practicing of the invention as would still achieve the principal advantages of the invention although modifying somewhat the preferred operations of the purifying step." (R. 495).

Appellant submits that on the record there is no evidence whatsoever of insufficiency of the oath. Consequently, at the very least a genuine issue of fact is raised by appellant as to the sufficiency of the oath.

Moreover, as a matter of law, this ground does not constitute a defense, since the patent statutes do not require an oath in support of the application for reissue. This fact was noted in *Fehr v. Activated Sludge*, 84 F.2d 948 (7th Cir. 1936). In that case the court refused to find a reissue patent invalid on the ground of the alleged failure of the oath to sufficiently set out the error, stating that, “. . . the commissioner in passing upon the petition may supplement its disclosures with any pertinent information gained from the records in his office.” *Fehr, supra* at 950. To the same effect, see *General Radio Co. v. Allen B. DuMont Laboratories*, 129 F.2d 608, 612 (3rd Cir. 1942).

In the present case the record shows that the oath itself set forth the precise nature of the error relied upon, so that no additional information was required. However, if the commissioner found it necessary, he had available to him the file history of the original application and all the prior art considered during the prosecution of the application, so that the commissioner could assure himself that it was in fact error to leave the roasting limitation in after the citation of the Brooke patent made it apparent that roasting was not a distinction over the prior art.

The district court erred in its finding of fact and conclusions of law made ostensibly to support its judgment on this ground.

Finding of fact 2.7 is erroneous on summary judgment because at the very least there was evidence sufficient to raise a genuine issue of fact on whether the oath showed "error" as defined in the statute.

Conclusion of law 6 is erroneous on summary judgment because there is sufficient evidence to raise a genuine issue of material fact on whether the record before the Patent Office showed "error without deceptive intention" under 35 U.S.C. §251.

Conclusion of law 7 is erroneous on summary judgment because there is sufficient evidence to raise genuine issues of fact on:

- 1) whether the oath describes the error; and
- 2) whether without the oath, the commissioner had sufficient evidence before him to find error.

It is clear that the district court erred in holding for appellees on this point on motion for summary judgment.

VI.

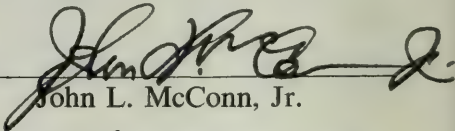
CONCLUSION

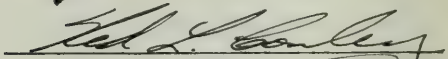
Appellant respectfully submits that the district court erred in granting summary judgment on each of the five grounds presented by appellees, and that such judgment

should be reversed and remanded to the district court for trial.

Respectfully submitted,

BUTLER, BINION, RICE, COOK
& KNAPP

By 
John L. McConn, Jr.


Ned L. Conley

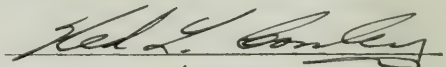
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

This is to certify that three copies of this brief have been served on counsel for the appellees by mailing them to their addresses of record.


Attorney

APPENDIX

Exhibit No.	Reference Page Number In Printed Record
<i>Appellant's</i>	
A	89, 172, 669
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C	384, 669
D	89, 170, 669
E	88, 173, 669
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H	668
I	668
J	668
K	668
L	668
M	668
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Exhibit No.	Reference Page Number In Printed Record
<i>Appellees'</i>	
A	335
B	340
C	341
D	342
E	345
F	360
G	416
H	484

United States Court of Appeals

For the Ninth Circuit

No. 22495

PROLER STEEL CORPORATION, INC.,

Plaintiff-Appellant,

v.

LURIA BROTHERS & COMPANY, INC., and

LIPSETT STEEL PRODUCTS, INC.,

Defendants-Appellees.

APPENDIX TO DEFENDANTS-APPELLEES' BRIEF

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FILED

MAY 2 1968

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United States Court of Appeals

For the Ninth Circuit

No. 22495

PROLER STEEL CORPORATION, INC.,

Plaintiff-Appellant,

v.

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LIPSETT STEEL PRODUCTS, INC.,

Defendants-Appellees.

APPENDIX TO
DEFENDANTS-APPELLEES' BRIEF

**Chart Comparing Claim 9 of Proler Reissue Patent,
the Proler Process, Appellees' Noninfringing Process
Until April 1965 and Appellees' Accused Process
After April 1965**

(See Opposite )

CLAIM 9 OF THE
PROLER PATENT

Step 1:

Shredding the raw material

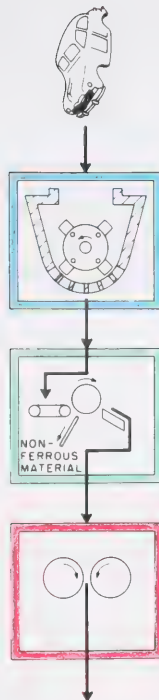
Step 2:

Separating the more ferrous bearing shredded material
from the less ferrous bearing shredded material

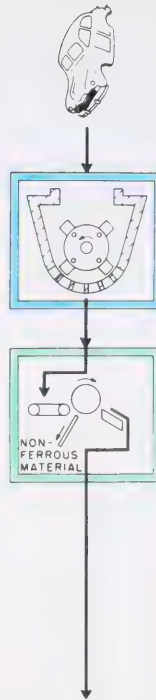
Step 3:

Individually compacting and balling up the pieces
of the more ferrous bearing shredded material to
densify it while maintaining the individuality of
the separate pieces

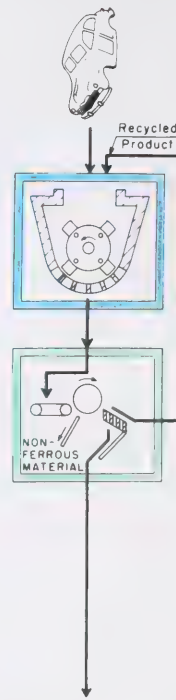
PROLER'S PROCESS



LURIA'S NONINFRINGING
PROCESS UNTIL
APRIL 1965



LURIA'S ACCUSED
PROCESS AFTER
APRIL 1965




— FRAGMENTIZED FERROUS SCRAP —

3a

4a

Proler Reissue Patent Re. 25,034

(See Opposite )

Aug. 29, 1961

S. PROLER

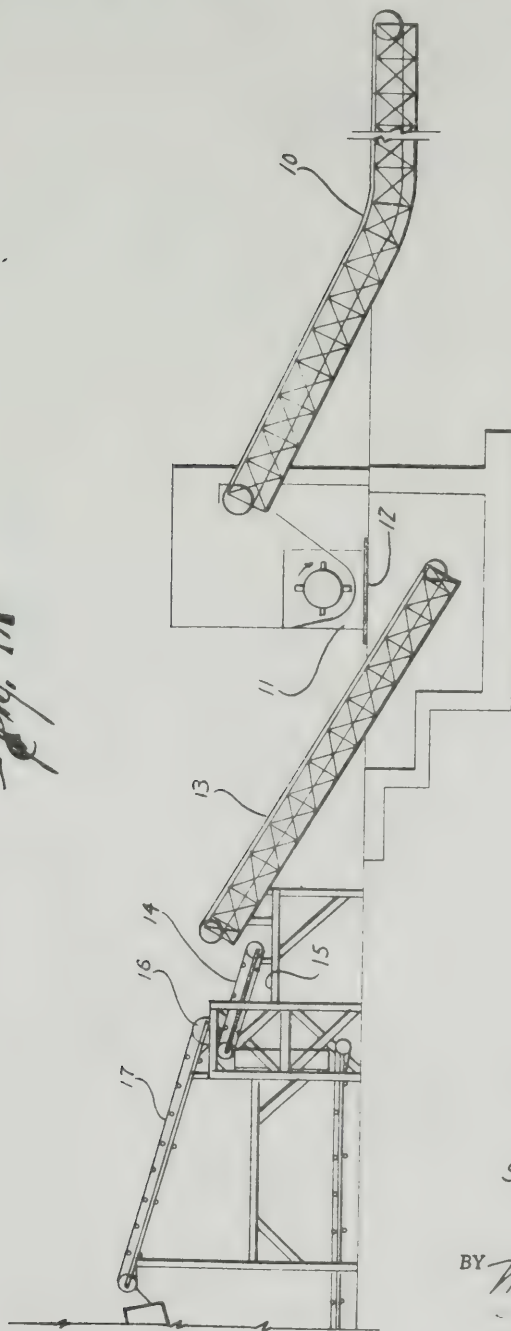
Re. 25,034

SCRAP REFINING PROCESS AND PRODUCT

Original Filed Aug. 12, 1957

3 Sheets-Sheet 1

Fig. 1A



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INVENTOR.

BY *Murray Robinson*
ATTORNEY

Aug. 29, 1961

S. PROLER

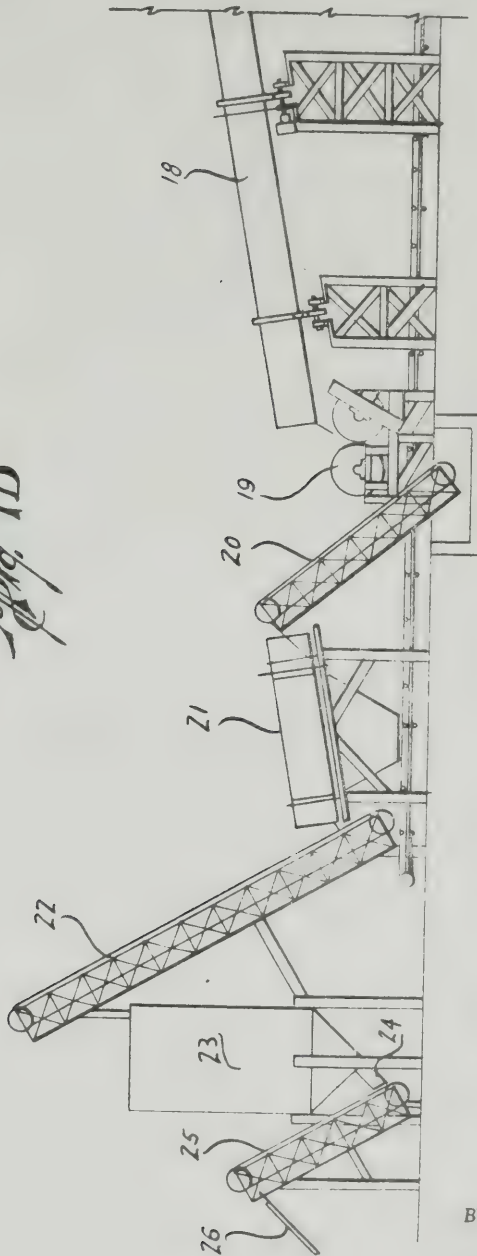
Re. 25,034

SCRAP REFINING PROCESS AND PRODUCT

Original Filed Aug. 12, 1957

3 Sheets-Sheet 2

Fig. 1B



Sam Proler
INVENTOR.

BY *Murray Robinson*
ATTORNEY

Aug. 29, 1961

S. PROLER

Re. 25,034

SCRAP REFINING PROCESS AND PRODUCT

Original Filed Aug. 12, 1957

3 Sheets-Sheet 3

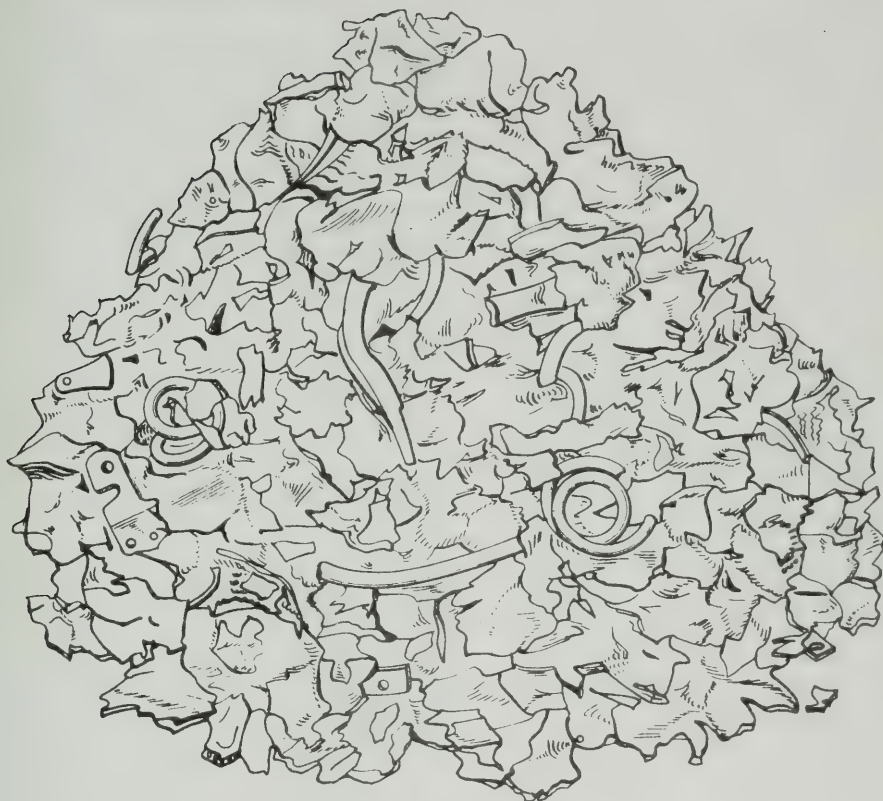


Fig. 2

Sam Proler
INVENTOR.

BY *Murray Robinson*
ATTORNEY

1

25,034

SCRAP REFINING PROCESS AND PRODUCT

Sam Proler, Houston, Tex., assignor to Proler Steel Corporation, Houston, Tex., a corporation of Texas

Original No. 2,943,930, dated July 5, 1960, Ser. No. 849,116, Oct. 27, 1959, which is a continuation of Ser. No. 677,514, Aug. 12, 1957. Application for reissue Dec. 5, 1960, Ser. No. 73,930

10 Claims. (Cl. 75-44)

Matter enclosed in heavy brackets [] appears in the original patent but forms no part of this reissue specification; matter printed in *italics* indicates the additions made by reissue.

This invention pertains to refined scrap and a method of making same; more particularly it pertains to a process of upgrading contaminated ferrous scrap to make a product more suitable for charging directly or indirectly into a furnace for making iron or steel such as an open hearth furnace, blast furnace, electric furnace, cupola type furnace, for example. This application is a continuation of Serial No. 677,514, filed August 12, 1957, now abandoned.

A particular object of the invention is to convert material heretofore suitable only for making what is known in the trade as a number 2 or number 3 scrap bale into a material equivalent or superior to a number 1 bale of scrap.

A further object of the invention is to effect such a conversion at a cost that is low enough to effect an overall saving in the cost of steel production compared to the use of number 1 scrap bales.

A further object of the invention is to produce a flowable material, analogous to graded hard coal or rock, which can readily be handled by conventional continuous conveyors such as augers or buckets or belts, as distinguished from unitized bales requiring individual handling.

Other objects and advantages of the invention will appear from the following description thereof.

According to a preferred method embodying the invention an appropriate raw material is reduced to a proper size by milling it up until it is cut to a size that will pass a grate having openings somewhat less than a foot square, the resulting shredded material is magnetically separated, the separated more ferrous material is purified by counterflowing it through a rotary kiln heated to about 1300° to 1800° F. at the exhaust end to melt and burn off adhered non-ferrous material, and the resulting clean scrap is compacted while still hot by rolling extrusion. The term "non-ferrous" is used in its broad sense, meaning any material that is not ferrous, whether metallic or not, and covering for example everything from brass to grass, from grease to concrete.

For a more detailed description of the invention reference will now be made to the accompanying drawings wherein:

FIGURES 1A and 1B together constitute a semi-schematic layout of apparatus suitable for carrying out the method of the invention; and

FIG. 2 depicts a pile of scrap material made according to the invention.

Referring now to FIGURE 1, the apparatus there shown will be described in order of its operation on the material. An appropriate raw material is placed on apron conveyor 10 at the lower end thereof and carried up to the upper end. An appropriate raw material is any kind of scrap including a goodly proportion (preferably at least about 50% by weight) of heavy gage (28 gage and over) ferrous sheet steel, flat or shaped, such as complete automobiles with or without engines, ice boxes, stoves, washing machines, refrigerators, steel desks, hot water heaters, toys, bicycles, and appliances and parts thereof. Steel in

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non-sheet form such as wire, rods, shafts, bars, plates, and structural forms may also be present although the more usual raw material will contain less of such material and more of the previously mentioned type for the reason that the latter is usually sufficiently clean to be manually separated and made into a number 1 bale without further treatment. Cast iron and tin plate are undesirable and should not be present in excess of about 5% by weight.

The raw scrap falls off the upper end of the conveyor into the mouth of a reducing means 11 which is preferably of the type known as a hammer mill. There the sheet metal is largely cut and shredded and the other material is cut and shredded and broken until the material is small enough to pass through the openings in grate 12. The openings in grate 12 may be rectangular in shape, preferably having dimensions of 6" by 10", although openings having any shape and a maximum dimension up to 12" are contemplated.

The reduced material falls through grate 12 onto the lower end of apron conveyor 13 and is carried to the upper end thereof where it falls off into a picking belt 14. An operator standing nearby on platform 15 removes from belt 14 such material as is obviously undesirable such as pieces which might interfere with subsequent operations. Also any particularly valuable non-ferrous scrap piece may be removed at this point. The picked over material is carried by belt 14 to magnetic pulley 16 where the more ferrous material is caught and carried up onto belt 17 while the non magnetic material passes under pulley 16 and drops off the end of belt 14. By means of this manual and magnetic separation the free more ferrous scrap is thus separated out from the reduced scrap coming from the hammer mill. Any suitable magnetic separator can be used.

The reduced separated more ferrous scrap falls off the upper end of belt 17 into the upper end of rotary furnace 18 where it is roasted to separate the adhered non-ferrous material from the ferrous. This furnace may be smooth on the interior as in a calcining kiln but preferably is provided with lifting flights as in a dryer so as to tumble the material more effectively as it is roasted. The furnace is preferably heated by a gas burner at its lower end with the material flowing down through the furnace counter-current to the hot gas flowing upwardly therethrough in direct contact therewith. A temperature at the burner end of 1300 to 1800 degrees F. is suitable for burning off paper, wood, grease, oil, paint, rubber and other combustibles, melting off tin and lead and other non-ferrous coatings, and cracking off various porcelain and other stone-like finishes.

If desired, the roasted material can next be trommeled to separate the clean ferrous scrap from the freed non-ferrous solid material. However most of the adhered non-ferrous material freed in the roasting operation will be either liquified or volatilized and escape without special attention. Therefore the roasted material can be fed directly from the furnace to rolling mill 19. This is preferable because the material will be hotter if fed directly to the rolling mill.

In mill 19 the hot roasted clean scrap is compacted so that the component pieces are to a certain extent balled up with the result that a somewhat flowable, i.e. only loosely cohering material results. The compacting increases the density of the product from the order of about 25 pounds per cubic foot to the order of about 50 pounds per cubic foot resulting not only in a space saving in transportation but a reduction in the volatilization loss when the material is charged into a steel furnace.

After passing through the compacting rolls the material falls onto the lower end of conveyor 20 which carries it up to the mouth of a rotary screen 21 where it is trommeled. The screen preferably has apertures of

about $\frac{1}{4}$ " maximum dimension. As the material descends through the trommel toward its lower end, any remaining fine material freed in the roasting or compacting operations, such as oxides, falls through the holes in the screen away from the main body of the scrap. The trommeling inherently shakes and jars the scrap so as to remove further loosely adhering particles.

If desired the output from the rotary screen can be subjected to a further magnetic separation but it is believed that this will usually be unnecessary and the material falling out of the rotary screen preferably is carried by a conveyor 22 directly to a railroad car or to a storage hopper 23. As desired the final product can be removed from the bottom of the hopped by opening a gate in the outlet 24 thereof whereby the material will be discharged onto the lower end of conveyor 25. The material will be deposited by conveyor 25 into chute 26 leading to a railroad car, truck, or other transportation device.

The product resulting from the above described process is shown in FIGURE 2. It is a high quality material suitable for charging all types of steel furnaces. By virtue of the process it is substantially free of loose and adhered nonferrous material and has a maximum piece dimension less than one foot with the possible exception of a few bars which may have escaped cutting into shorter lengths in the hammer mill and gone through its grate end-wise. It will have a density of at least 50 pounds per cubic foot and usually more in the vicinity of 60 pounds per cubic foot or even higher. By virtue of the choice of feed material, the minimum dimension of the product is not less than 28 gage, i.e. 0.0149 inch. Also, by excluding a majority of plated products such as tin cans the product will be substantially free of absorbed non-ferrous material. In summary, by use of a suitable raw material and the process according to the invention there is produced at low cost a refined scrap material product that is comparable or superior to number 1 scrap bales for which there is great demand as a furnace charging material. The material is suitable for either direct feed into a steel furnace, or into hot metal from a blast furnace or into a blast furnace directly along with the ore to increase the yield. It is suitable for use in all types of furnaces.

While a preferred embodiment of the invention has been shown and described, many modifications thereof can be made by one skilled in the art without departing from the spirit of the invention and it is desired to protect by Letters Patent all forms of the invention falling within the scope of the following claims:

1. Process of refining a raw ferrous bearing scrap material comprising shredding the raw material, separating the more ferrous bearing shredded material from the less ferrous bearing shredded material, roasting the more ferrous bearing shredded material at a temperature sufficient to remove substantially all non-ferrous metals, and individually compacting and balling up the pieces of the more ferrous bearings shredded material to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained.

2. The product of the process of claim 1.

3. Process of upgrading junkyard type raw ferrous scrap such as automobiles to a fluent bulk furnace charging material comprising milling the raw scrap to a reduced piece size, magnetically separating the more ferrous milled scrap from the less ferrous milled scrap, roasting the more ferrous milled scrap at a temperature sufficient to separate substantially all adhered non-ferrous materials, and individually compacting and balling up the pieces of the roasted ferrous scrap while below the welding temperature of steel to densify the roasted ferrous scrap while maintaining the individuality of the separate pieces sufficient to keep the final product fluent.

4. Process of upgrading junkyard type raw ferrous scrap such as automobiles, having at least a large proportion of sheet material of at least 28 gage and no more than a small proportion of plated material, to a fluent bulk furnace charging material comprising cutting, shredding, and breaking the raw scrap to a reduced piece size, magnetically separating the more ferrous pieces of scrap from the less ferrous pieces of scrap, roasting the more ferrous pieces of scrap at a temperature sufficient to burn, melt, evaporate, and crack off substantially all adhered non-ferrous materials, and separately compacting and balling up the individual pieces of the roasted scrap while below the welding temperature for steel to densify the bulk roasted scrap while maintaining the individuality of the separate pieces sufficient to keep the final product fluent.

5. A process as defined by claim 4, wherein the magnetic separation step is repeated after the roasting step.

6. Process of refining a raw ferrous bearing scrap material comprising reducing the piece size of the raw material, separating the more ferrous pieces of material from the less ferrous pieces of material, roasting the more ferrous pieces of material at a temperature sufficient to separate substantially all adhered non-ferrous materials from the ferrous pieces, and separately passing the individual ferrous pieces through a rolling mill.

7. Process as defined by claim 6 wherein a fluent mass having a density of at least about 50 pounds per cubic foot is formed.

8. Process of upgrading junkyard type raw ferrous scrap such as automobiles, having at least a large proportion of sheet material of at least 28 gage and no more than a small proportion of plated material, to a fluent bulk furnace charging material, comprising milling the raw scrap to a piece size small enough to pass a grate of no larger than one foot opening size, magnetically separating the more ferrous milled scrap from the less ferrous milled scrap, roasting the more ferrous milled scrap at a temperature in the range of 1300 to 1800 degrees F., and individually compacting and balling up the pieces of the roasted scrap while below the welding temperature for steel to increase the density of the bulk roasted scrap while maintaining the individuality of the separate pieces sufficient to keep the final product fluent.

9. Process of refining a raw ferrous bearing scrap material comprising shredding the raw material, separating the more ferrous bearing shredded material from the less ferrous bearing shredded material, and individually compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained.

10. Process of refining a raw ferrous bearing scrap material comprising shredding the raw material, separating the more ferrous bearing shredded material from the less ferrous bearing shredded material, and separately passing the pieces of the more ferrous bearing shredded material individually through a rolling mill.

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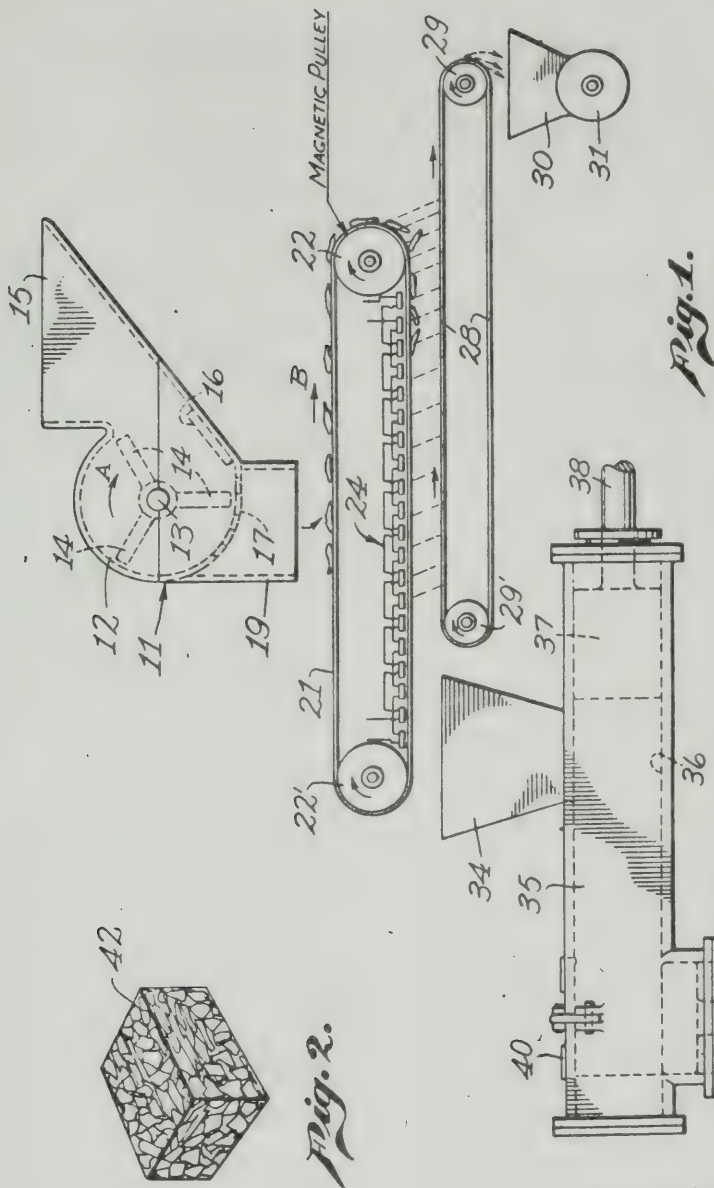
Gregg United States Letters Patent No. 2,059,229

(See Opposite )

Nov. 3, 1936.

C. M. GREGG
METHOD OF PREPARING DISCARDED AUTOMOBILE FENDERS
AND SIMILAR MATERIALS FOR MELTING PURPOSES
Filed Aug. 19, 1935

2,059,229



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Attorney

UNITED STATES PATENT OFFICE

2,059,229

METHOD OF PREPARING DISCARDED AUTOMOBILE FENDERS AND SIMILAR MATERIALS FOR MELTING PURPOSES

Clarence M. Gregg, Los Angeles, Calif., assignor to Los Angeles By-Products Co., a corporation of California

Application August 19, 1935, Serial No. 36,864

3 Claims. (Cl. 29—160.5)

This invention has to do in a general way with the manufacture of iron and steel and is more particularly related to an improved process for preparing scrap iron or scrap steel for use as a raw material in the manufacture of steel.

As is well known to those familiar with the art, scrap iron has long formed one of the sources of raw material for the steel industry. Although part of this scrap iron is obtained from refuse and cuttings from foundries, machine shops, sheet metal works, etc., a large proportion of the scrap is obtained from city dumps and junk yards where it is associated with a great deal of non-ferrous material of both metallic and non-metallic nature. This latter type of scrap iron due to the large amount of dirt and foreign matter which it contains, commands a much lower price than "clean" scrap of the type first referred to above, due, first, to the increased cost of handling a given weight of iron as a result of the large amount of foreign material which contaminates the iron, and second, to the fact that the contaminating material results in the production of an inferior product. This latter factor is especially true when the scrap iron contains foreign materials of metallic nature, such as brass, copper, zinc, pewter, etc., and also in the event it is to be used in an open-hearth process where the operators, in order to obtain the desired results, try to avoid as much of the slag as possible.

The process of this invention is primarily concerned with the last mentioned type of scrap and has as its primary object the production from scrap metal such as is obtained from city dumps, junk yards and the like, a clean high-grade scrap iron or melting bale from which all of the non-ferrous material has been removed and which will command a price from the market and will produce a product equal to the finest grade of scrap iron.

Another difficulty which is encountered in the use of ordinary scrap iron resides in the bulkiness and the difficulty with which it is handled, and my invention further contemplates the production of scrap iron of the class described in bales or units of convenient size and very high density so that they may be handled and shipped at minimum cost. Another factor of even greater importance resides in the fact that sheet metal such as is found in discarded automobile fenders and bodies, normally presents a very great surface to oxidation, which is not materially diminished by the usual method of battering and bundling as now practiced. In the process contemplated by this invention, the metal is so com-

pressed and baled as to present a minimum surface for oxidation, thereby reducing materially the oxidation loss both in the furnace and due to "weathering".

One of the chief sources of scrap iron today resides in old discarded automobile bodies, particularly the fenders thereof, which are formed of sheet metal shaped so that they are extremely awkward to handle and are frequently associated with non-ferrous materials in a manner such that the separation of the iron from such materials under methods as they are now known and practiced, would make the cost of the scrap metal to the steel foundries prohibitive. The usual procedure in preparing the scrap metal of this character for the steel industry is to dump the old bodies into a fire of burning junk so as to burn off most of the organic material and then batter them into large awkward bales or bundles by means of a drop hammer. The bodies are ordinarily dismembered or cut into large sections more convenient for handling before being subjected to the action of the drop hammer. No attempt is made to remove the non-ferrous material such as the brass parts and fittings, nor is the dirt and non-combustible matter adhering to the fenders and other exposed surfaces removed before the metal is bundled. As a consequence the scrap material prepared in this way is contaminated to a very large degree by undesirable substances and although the steel content itself may be of the very highest quality, the material cannot command the high price nor will it produce the fine quality product that the steel content would otherwise warrant. My invention has therefore been devised primarily for the purpose of preparing this last mentioned type of scrap iron for melting purposes, but it is to be understood that while the process possesses certain advantages in connection with this type of scrap, that the invention is not in any way limited to this particular application.

The details in the method contemplated by this invention, together with other objects attending its production will be best understood from the following description of the accompanying drawing which diagrammatically illustrates one form of apparatus which may be employed in the practice of this process and in which,

Fig. 1 is a diagrammatic view showing the apparatus, and

Fig. 2 illustrates a bale or "billet" of material formed in the process of this invention.

In carrying out the process of my invention in connection with automobile bodies or other scrap

metal which is associated with organic material, it is preferable to first burn or heat the scrap in a relatively low temperature oxidizing fire to remove this organic material. Either before or after the "burning" operation, the scrap may be reduced in size by means of shears or other suitable cutting tools. This last mentioned step is dependent upon the size and power of the apparatus to be subsequently used and may, if an apparatus of sufficient size or shredding and beating means of suitable design are employed, be eliminated.

The scrap prepared in this way is then fed to a shredding machine preferably of extremely heavy and powerful construction such as is indicated diagrammatically by reference numeral 11 in Fig. 1. This shredding machine preferably consists of a heavy housing 12 having a cross shaft 13 supported in suitable bearings and associated with a powerful driving means such as an electric motor (not shown). The cross shaft 13 is provided with a multiplicity of heavy hammers or cutters 14 which are adapted to be rotated in the general direction of the arrow A so as to drive down upon and through the scrap metal which is fed through the hopper 15 over a heavy battering plate 16. The shredder is preferably provided with a screen indicated in dotted lines by reference numeral 17 so that the metal therein is beaten and shredded to a predetermined maximum size.

During this beating and shredding operation both the iron and the non-ferrous materials are thoroughly disintegrated and loosened and separated from one another so that the mass which is delivered from the shredder through the chute indicated at 19 consists of a mixture of iron and non-ferrous material.

This mixture or mass of material drops from the chute 19 onto a separator which is preferably of magnetic character and is illustrated as comprising a belt 21 which travels in the direction of the arrow B over a magnetic pulley 22 and a non-magnetic pulley 22' and below a magnetic blanket indicated by reference numeral 24. This magnetic blanket 24 is preferably formed of a plurality of magnets which are alternately arranged with their north and south poles facing downwardly so that the iron or steel is held against the bottom run of the belt 21 and is turned over and over as the belt travels thereby further cleaning the iron of any dirt or oxide which may have adhered thereto after it has passed through the shredder 11.

The dirt and non-ferrous material which is carried with the iron falls onto a traveling belt 28 which is shown as traveling in the opposite direction from the lower run of the belt 21, this last mentioned belt being supported by pulleys 29 and 29' operated in any suitable manner so as to convey the refuse material away from the iron which is to be recovered. This refuse material is shown as being dumped into a hopper 30 which is also shown as being associated with a screw conveyor 31 for conducting the same to a suitable dump pile.

When the scrap iron is released from the influence of the magnetic blanket 24 as is the case

in the region of the pulley 22' it is dumped into a suitable storage bin, or, as shown, is delivered into a hopper 34 on a baling press 35. Various types of baling presses may be used for the purpose of compressing the shredded scrap iron into units or blocks of convenient size for handling and in the drawing I have diagrammatically illustrated the press as comprising a cylinder member 36 associated with a ram or plunger 37 which in turn is actuated through a piston rod 38 from any suitable source of power such as a hydraulic ram (not shown). The compressing chamber of the baling press is shown as being provided with a door 40 and is associated with an ejector cylinder generally indicated by reference numeral 41. The material as it is being baled is subjected to a tremendous pressure and in view of the irregular shape of the individual particles, these particles are interlocked in the bale so that it is in the nature of a solid unit as indicated in Fig. 2 by reference numeral 42 and does not require tying or strapping. In other words, the bales or units as they are ejected from the baling press are ready to be loaded for shipment or delivered to the melting furnace for the manufacture of steel. Also, as has been indicated above, the metal of the bale has a minimum surface exposed to oxidation so that it is of a quality corresponding substantially to the so called "heavy scrap" (shafts, forgings, etc.) or billets.

It is to be understood that while I have herein described in detail one preferred form of apparatus for practicing the process of this invention, that the invention is not in any way limited to the specific form of apparatus shown but includes within its scope whatever changes fairly come within the spirit of the appended claims.

I claim as my invention:

1. The method of preparing ferrous melting scrap from a miscellaneous mixture of ferrous and non-ferrous scrap materials which includes: subjecting said miscellaneous scrap to a beating and shredding operation to disintegrate the iron and non-ferrous material therein; magnetically separating the iron from the non-ferrous material in said disintegrated mass; and compressing the loose shredded scrap iron so separated into a compact bale.

2. The method of preparing discarded automobile fenders and similar scrap materials for melting purposes which includes: subjecting said scrap to a beating and shredding operation to disintegrate the iron and non-ferrous material therein; separating the iron from the non-ferrous material in said disintegrated mass; and compressing the loose shredded scrap iron so separated into a compact bale.

3. The method of preparing scrap iron for melting purposes which includes: subjecting said scrap to a beating and shredding operation to disintegrate the iron and non-ferrous material therein; passing the disintegrated material beneath a magnetic blanket and above a traveling conveyor to separate the iron scrap from the non-ferrous material; and compressing the loose iron scrap so separated, into compact bales.

CLARENCE M. GREGG

7a

Affidavit of Walter R. Derlacki

(342)

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF CALIFORNIA

Case No. 65-1201-F

[SAME TITLE]

State of Ohio)
County of Cuyahoga) ss.:

Walter R. Derlacki, being duly sworn, deposes and says:

I am General Manager of Engineering for Luria Brothers & Company, Inc. (hereinafter called "Luria"), one of the defendants in this action, and I have supervised the building and operation of defendants' plant in Vernon, California, for producing a fragmentized ferrous scrap which defendants call Lurmet.

The commercial operation of defendants' Vernon plant began in September, 1963, and from that date until April, 1965, defendants produced Lurmet by a process which included (343) the steps of shredding raw ferrous scrap in a hammermill and then magnetically separating the ferrous pieces from the nonferrous material.

During the period of commercial production up to May, 1965 (as well as subsequent to that date), defendants experimented with modifications in the apparatus and process with the objective of minimizing costs and developing

Affidavit of Walter R. Derlacki

knowledge in the production of shredded scrap. One cost problem in the operation of hammermills in shredding scrap is the wear of the shredding hammers, the grates and the breaker plates, as well as other parts.

One area of experimentation by defendants was with grates having openings of different sizes. These experiments confirmed our belief that the bulk density of Lurmet increased with grates having smaller openings and decreased with grates having larger openings. Defendants also found, as we had expected, that overall wear in the hammermill increased with the smaller grate openings and decreased with larger openings.

In April, 1965, defendants modified their commercial operation by installing in their hammermill grates having larger openings than the grates then currently in use (although grates previously used in defendants' process had such larger openings) and began separating out the larger pieces of ferrous scrap from the product and recycling them through the hammermill to produce Lurmet in the same density range as the product made prior to April, 1965.

I believe that the changes made during April, 1965, improved the efficiency of defendants' hammermill by minimizing over-grinding of the steel fragments, by increasing (344) the capacity of the hammermill and by decreasing the power requirements with the resulting reduction in wear, stress and other causes of down time.

Walter R. Derlacki

(Sworn to June 23, 1967.)

Affidavit of Menelaos D. Hassialis

(345)

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF CALIFORNIA

[SAME TITLE]

State of New York)
County of New York) ss.:

MENELAOS D. HASSIALIS, being duly sworn, deposes and says:

I am an engineer and have been a member of the faculty of Columbia University for the past thirty years and chairman of the Krumb School of Mines of Columbia University for the past fifteen years. My fields of specialty are metallurgy, mineral engineering and mining, and through these fields of specialty I have acquired a knowledge of hammer-mills and their operation and of the technology used in the production of steel, including familiarity with ferrous scrap used in the manufacture of steel.

(346) I have been retained by the defendants, Luria Brothers & Company, Inc. and Lipsett Steel Products, Inc., to study plaintiff's and defendants' processes for fragmentizing scrap for use in the manufacture of steel and to conduct tests to establish facts which may be relevant to the issues in this lawsuit.

At the time that I inspected and conducted tests at defendants' plant at Vernon, California, the plant was then

Affidavit of Menelaos D. Hassialis

producing ferrous scrap by a process in which automobiles and other ferrous scrap were fragmentized in a hammer-mill, the ferrous pieces were separated from the nonferrous material by a magnetic separator, and larger pieces of the ferrous material were separated from the fragmentized ferrous pieces and recycled through the same hammermill.

The separating of the larger pieces of material fragmentized in a hammermill and the recycling of the larger pieces through the same hammermill is a procedure long known and used in hammermill operations and is sometimes referred to as a "closed circuit" or a "circulating" hammermill operation. The fragmentizing of material in a hammermill in a "once through" operation without recycling is sometimes called an "open circuit" operation. It has been recognized for decades that hammermill wear can be reduced and efficiency and capacity increased in the production of a fragmentized product of a particular density by installing larger grate openings in the hammermill and changing the hammermill from an open to a closed circuit operation. Attached hereto as Exhibits E-1, E-2 and E-3 are copies of pages of the following textbook references describing closed (347) circuit or circulating operations of hammermills:

E-1. Taggart, *Elements of Ore Dressing* (1951) p. 381.

E-2. Richards, Locke and Schuhmann, *Textbook of Ore Dressing* (1940) p. 104.

E-3. Taggart, *Handbook of Mineral Dressing* (1927) pp. 4-84 to 4-86.

One of the tests which I conducted was to determine whether the larger separated pieces of ferrous material are further shredded and subdivided when they are recycled through the hammermill.

Affidavit of Menelaos D. Hassialis

My test procedure was as follows:

I selected sheets of galvanized steel having an average thickness of .048 inch because this material can be identified after fragmentization in the hammermill and the gauge is approximately that of the sheet steel used in the manufacture of automobile bodies. The sheets were crumpled somewhat to impart to them a shape more characteristic of the sheet metal of scrap automobile bodies, and the sheets were placed on the feed conveyor along with automobile bodies.

The automobile bodies and sheets of galvanized steel were processed in defendants' plant in the usual manner, that is, they were shredded in the hammermill, the ferrous fragments were separated from the nonferrous material, and the larger fragments of the ferrous material were separated from the ferrous pieces and collected on the recycling conveyor until the recycle conveyor was full. The material on the recycle conveyor (hereafter referred to as recycle sample A) was then removed from the recycle conveyor. The procedure was then repeated to produce another sample (hereafter referred to as recycle sample B) on the recycle conveyor.

(348) In separating out the larger fragments to be recycled some undersize material is carried along onto the recycle conveyor with the larger fragments. The pieces one inch and less of the recycle samples A and B were discarded because these pieces are well below the size that the plant was designed to recycle. The galvanized steel fragments more than one inch in size (hereinafter referred to as "plus one inch") of both recycle samples A and B were counted.

Affidavit of Menelaos D. Hassialis


Recycle sample B was then fed into the hammermill simultaneously with automobile bodies, and the discharge was then collected and screened on a one inch screen . The pieces of plus one inch galvanized steel were collected and counted. The remaining material was then screened on a $\frac{1}{2}$ inch screen and the plus $\frac{1}{2}$ inch galvanized pieces were collected and counted. The ratios of galvanized pieces after and before recycling were 3.3:1 for all plus one inch pieces and 5.1:1 for all plus $\frac{1}{2}$ inch pieces. The less than $\frac{1}{2}$ inch pieces were numerous, and the ratio would be greatly increased if they had been counted.

The recycle sample A was then fed into the hammermill without other feed to simulate the operating condition in which the continuously operating recycle conveyor feeds recycle material to the hammermill during a gap in the introduction of automobile bodies to the hammermill. The product was collected, screened through a one inch screen, the plus one inch galvanized pieces were separated and counted, the remaining material was screened through a $\frac{1}{2}$ inch screen, and the plus $\frac{1}{2}$ inch pieces of galvanized material were separated and counted. The ratios of galvanized pieces of recycle sample A after and before recycling were 3.6:1 for (349) all plus one inch pieces and more than 5.3:1 for all plus $\frac{1}{2}$ inch pieces. The less than $\frac{1}{2}$ inch pieces were numerous, and the ratio would be greatly increased if they had been counted.

These tests show that the recycled ferrous pieces are shredded and subdivided well over fivefold in defendants' hammermill.

Menelaos D. Hassialis

(Sworn to June 13, 1967.)

**Exhibit E-1 Annexed to Affidavit of
Menelaos D. Hassialis
Taggart, *Elements of Ore Dressing* (1951) p. 381
(See Opposite )**

ELEMENTS OF ORE DRESSING

By

ARTHUR F. TAGGART

*Professor of Mineral Engineering
School of Mines, Columbia University*

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DATE 29 Feb 1965	FOR ID.
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size. Both of these results are unsatisfactory in ordinary milling practice. If, however, a size separator is introduced into the circuit and the flow is arranged so that nothing can escape except as undersize of this separator, oversize being returned continuously to the size reducer, particle-size distribution in the product is changed so that average product size is much coarser, and the capacity of the size reducer is increased markedly. Such an arrangement is called a closed circuit.

There are two basic forms of closed circuits, as shown in Fig. 10. The characterizing difference lies in the order of size reducer and size

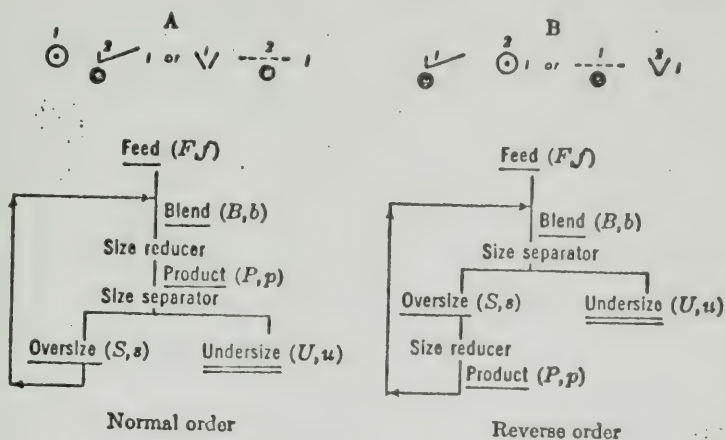


FIG. 10. Basic forms of closed circuits.

separator in the flow. The order reducer-separator (item A), which may be called the normal order, predominates in grinding circuits, whereas the reverse order (item B), with new feed to a scalping screen, predominates 5:1 in secondary crushing. Primary-crushing circuits are invariably open.

Inspection of Fig. 10 shows that the tonnage U of undersize must, on average, equal the tonnage F of new feed. Marked departures from this condition exist only during bring-up and shut-down and when feed rate or operation of the sizing device is changed. Otherwise fluctuations from equality are small. Hence the operating, balanced circuit is characterized by the condition

$$F = U \quad (11)$$

It follows from Eq. 11 that the composite stream tonnage B in each

**Exhibit E-2 Annexed to Affidavit of
Menelaos D. Hassialis**

**Richards, Locke and Schuhmann,
Textbook of Ore Dressing (1940) p. 104**

(See Opposite )

TEXTBOOK OF ORE DRESSING

BY

ROBERT H. RICHARDS, S.B., LL.D.

*Professor Emeritus of Mining Engineering and Metallurgy
at the Massachusetts Institute of Technology;
Author of "Ore Dressing"*

AND

CHARLES E. LOCKE, S.B.

*Professor of Mining Engineering and Ore Dressing, in Charge
of Department of Mining Engineering, at the
Massachusetts Institute of Technology*

ASSISTED BY

REINHARDT SCHUHMAN, JR., Sc. D.

*Assistant Professor of Mineral Dressing at the Massachusetts
Institute of Technology*

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THIRD EDITION
COMPLETELY REVISED AND REWRITTEN
FOURTH IMPRESSION

McGRAW-HILL BOOK COMPANY, INC.

NEW YORK AND LONDON

1940

CHAPTER IX

SIZING BY SCREENS

Screen sizing or volumetric sizing is useful in performing a variety of functions in ore concentration plants. (1) In crushing plants, screens are used for two general purposes: (a) to by-pass sufficiently fine material around a crushing machine to increase its capacity and (b) to form a closed circuit with a crushing machine and limit the maximum size of final product as well as to increase crushing capacity and efficiency. (2) In certain processes of concentration, particularly in gravity concentration above 1 or 2 millimeters, the crushed ore may be divided into a series of products by screening, in each of which the grains come within a limited range of size. Such a grading of the crushed ore into fractions for feed to the individual concentration machines enables each machine to be adjusted and operated for better separations than would be the case with unsized feed to these machines divided evenly by a mechanical distributor. (3) In laboratory testing of ores and mill products, segregation of the material into different size fractions for separate testing facilitates analyses of results, losses, and inefficiencies, in both comminution and concentration, to such an extent that sizing tests are an indispensable part of both routine control and research. (4) In certain industries, when product size forms a part of final product specifications, screens are used for commercial grading to segregate products for meeting these specifications.

PRINCIPLES OF SCREEN SIZING

SIEVE SCALE.—The list of successive screen sizes used in any mill, taken in order from coarsest to finest, is called the "sieve scale." For facility of interchange of results and data in publications, catalogues, and elsewhere, it has been found most convenient to adopt a *standard sieve scale* for sizing analyses and general testing work. Rittinger held that in a standard sieve scale the diameter of the holes in any screen must bear some constant ratio to that of the next screen above it in the series, thereby making the sieve scale a geometrical series. He adopted 1.414 ($= \sqrt{2}$) for this ratio, and it has since become the common sieve ratio. For closer sizing work the Richards or double Rittinger sieve ratio of 1.189 ($= \sqrt[3]{2}$) is common. The Tyler testing sieves, now the universal standard in most countries, are available including both these ratios, but the series with the ratio of 1.414 is usually used. The starting point is a 200-mesh screen as standardized by the United States Bureau of Standards with 0.0021-inch wire and 0.0029-inch opening. The Tyler series is shown in Table 23, with other pertinent data. The column giving screen openings in microns should be noted, as there is a tendency to express finer sizes in this unit in sizing fine materials such as fine-grinding and flotation products. This usage is a result of the extension of size analysis below 200 mesh by elutriation, in which the fine sizes are much more conveniently expressed in terms of microns than in other units. The physicists and chemists, particularly the colloid chemists, have established this unit in their related considerations of particle size in very finely divided material (see also Sizing in Chapter XVIII).

**Exhibit E-3 Annexed to Affidavit of
Menelaos D. Hassialis
Taggart, *Handbook of Mineral Dressing* (1927)
pp. 4-84 to 4-86**

(See Opposite )

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4/28/54
To my
with my*

HANDBOOK OF MINERAL DRESSING ORES AND INDUSTRIAL MINERALS

BY
ARTHUR F. TAGGART

LECTURE PROFESSOR EMERITUS OF MINING, SCHOOL OF MINES
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LONDON: CHAPMAN & HALL, LIMITED

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ARTHUR F. TAGGART
(under the title of *Handbook of Ore Dressing*)

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ARTHUR F. TAGGART

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4 38×30-in. machine running at 1,150 r.p.m.; power consumption 3.28 hp. hr. per ton; maintenance, 28¢ per ton. The machine has a variable-speed motor; when speed is dropped to 850 r.p.m. and closing screen is changed to 1/4 in., production rises to 15 t.p.h., power consumption is 1.60 hp. hr. per ton, and maintenance is 10¢ per ton. Aluminum oxide is crushed from <4-in. to <4-m. at the rate of 2.5 t.p.h. in

Table 28. Performance of hammer mills on cement rock ^a

Rotor, diam. X length, in.....	42 X 36	48 X 38	48 X 58
Speed, r.p.m.....	900	720	720
Feed: Limiting size, in.....	5	8	8
Tons per hr.....	100	300	500
Power: Motor hp.....	250	400	400
Consumed, billing, hp.....	22	38	38
Hr.-hr. per ton crushed..	1.8	0.8	0.5
Product: % retained on			
1 1/2-in.....			5.0
1.....			13.9
3/4.....	0.5	5.3	19.1
3/8.....	13.1	21.5	39.2
4-m.....	25.4	22.4	
8.....	20.6	20.5	13.6
14.....	14.8	12.8	2.2
28.....	6.1	6.5	1.7
48.....	5.5	3.8	0.9
100.....	3.6	3.0	0.4
<100.....	10.6	4.2	4.0
Maintenance, cents per ton.....	1 1/2	3/4	3/8

^a Laminated, medium hardness (10,000 to 15,000 lb. per sq. in. in compression), relatively nonabrasive.

used; whether the mill is in open or closed circuit; if the former, on the grid spacing; if the latter, additionally on the aperture of the closing screen; the shape, spacing and extent of wear of the breaking surfaces; rotor speed; clearance of hammer circle with respect to the lowest breaker plate and to the grids; hammer weight; etc. Some of these relationships for an impactor (machine without grid) are given in Figs. 54 to 59. These curves represent results (PC) of extensive tests on an operating machine working on tough river gravel, and, while not applicable directly as to magnitudes for softer materials, are dependable as to trends.

Fig. 54 shows that if the crushing zone is completely swept by hammers, as it was with three rows of stirrup hammers, two to a row, an increase of 50% in number of hammers produces but little additional

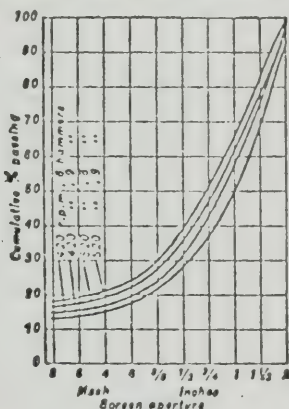


FIG. 54. Effect of number of hammers on product of an impactor (feed, river gravel, 4 1/2~1 1/4-in.).

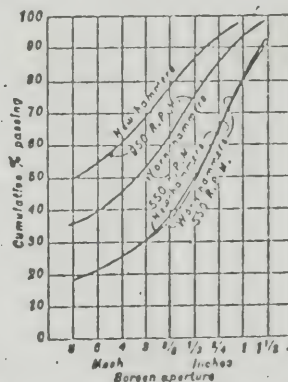


FIG. 55. Effect of hammer wear on impactor product (feed, river gravel, 4 1/2~1 1/4-in.).

crushing effect, and that this effect is less the higher the speed. Fig. 55 shows the loss in crushing effect due to worn hammers when speed is high enough for effective breaking (900 r.p.m.); it also shows that when speed is too low (550 r.p.m.) the state of the hammers makes little difference; in this event, in a grid machine, stalling would occur rapidly unless feed rate were greatly reduced below that at 900 r.p.m.

with new hammers. Fig. 56 indicates that within the usual range of ANVIL ADJUSTMENT the variation in crushing due to change in clearance is not great, but is definite, and that crushing increases with reduction in clearance. The effect is greatest in the coarse end of the product, as is to be expected. Fig. 57 shows that with a cage-type mill, crushing a moderately hard bituminous coal, decrease in clearance

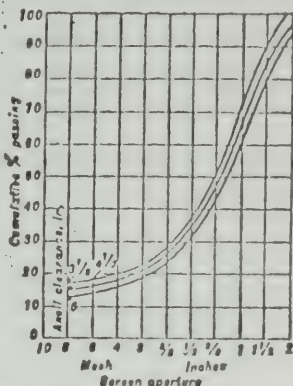


FIG. 56. Effect of anvil clearance on Impactor product (river gravel, $4\frac{1}{2}$ - $1\frac{1}{4}$ -in.; 420 r.p.m.).

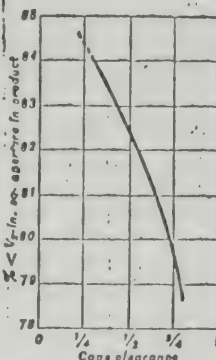


FIG. 57. Effect of cage clearance on size of bituminous-coal product.

has considerable effect on size of product. Fig. 58 shows the primary importance of high speed, particularly in the production of fines; the increase in fines is more than proportional to the increase in speed over the range investigated. Average speed is about 200 f.p.m. at the tip of new hammers, being, in general, somewhat lower for coarse feeds and coarse products and vice versa. This follows from the effect of particle size on striking force. Fig. 59 indicates that $\frac{1}{2}$ -in. size has little effect on the amount of <100-m. in the product but that the limiting reduction ratio increases with increase in size of feed from about 2 for the finer feeds tested to 3 for the coarsest. The ratio of 50%-sized (50% retained) is apparently largely dependent upon the smallest particles in the feed; for the conditions tested it was 5.5 for

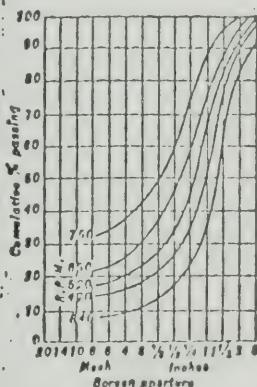
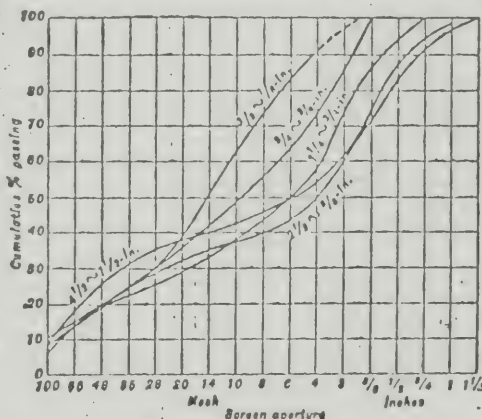


FIG. 58. Effect of speed on product of an Impactor (river gravel, $4\frac{1}{2}$ - $1\frac{1}{4}$ -in.).



River gravel. Feed sizes shown on curves. 550 r.p.m.; 9 stirrup hammers; 0-ft. drop; 3-in. anvil clearance.

FIG. 59. Effect of feed size on size of product of an Impactor.

$\frac{1}{8}$ in. lower also, from 0 to 8 for $\frac{1}{4}$ in. lower also, and jumped to 10 for $1\frac{1}{2}$ in. lower also. In so far as the 50%-point measures the average size of a comminuted product, the conclusion would seem to be that this type of mill is decidedly more effective in reduction of the coarse (1 1/2 in. min.) than the fine ($\frac{1}{8}$ - and $\frac{1}{4}$ in. min.) feeds.

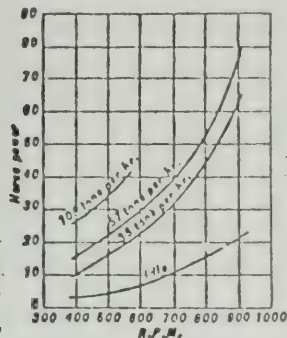
Mineralogical character of feed affects performance somewhat unexpectedly. In general hard tough rock crushes at a lower rate and requires more power than the complete converse, but reduction in

capacity with increase in power consumption with a given cage aperture and setting are reported in changing from Elkhorn to Pocahontas coals, and some clays are more difficult to crush than hard, compact limestones. The limiting machine factor is, in many such cases, the cage aperture and placing; it is probable that most of the discrepancies in reported results would disappear with suitable experimentation on this score.

Shape of product is of great importance in producing stone and sand for concrete work (see Sec. 3, Art. 41). Shape characteristics of products for different intermediate crushers have not yet been established generally.

At Nonnis Dam, crushing cherty limestone, $\frac{1}{4}$ -in. hammer-mill product was most nearly equized, followed in order by red mills, short-head cones, and rolls. The effect was more pronounced on the carbonate than on graywacke (42 80 RP 40). An entirely different order of machines might be found with a different rock.

Power consumption in a hammer mill is dependent upon the amount of crushing work that the mill does, which, in turn, is determined primarily by the character of feed, the size of product, the speed, and the feed rate. Fig. 60 shows the relationship between feed rate, speed, and power consumption for one set of conditions; the trend is characteristic of all.



Feed, $4\frac{1}{2}$ - $11\frac{1}{2}$ -in.; products, eco Fig. 57; 9 hammers; single-anvilage.

FIG. 60. Power consumption vs. speed in crushing river gravel at different rates in an Impactor.

ing largely to the extent of crushing, the moisture in the feed, and the sharpness of the steel.

Motors. A well-built hammer mill in secondary or fine service, with feed finer than 3-in., may be powered with a motor of not more than 15% overload capacity; if the feed size runs up to 4- or 5-in., peak loads will run 25 to 33% above normal full-load power draft; in coarse-crushing the power draft may fluctuate as much as in a jaw crusher (Art. 2). Recommended motor sizes are given in Tables 26 and 27.

Moisture in feed decreases capacity and increases power consumption markedly through the critical range in which fines are rendered sticky. With bituminous coal, capacity reduction is 30 to 50% and power increase about the same. The critical moisture range for most materials is about 6 to 10%. The cause is, of course, clogging of the grid. The remedy, if drying or further wetting is impractical, is to increase cage aperture or, if limiting size is important, to use a gridless machine and do the necessary screening on separate screens, better fitted for difficult separations, and where clogging will not cause excessive power consumption.

Feed rate should be regular; otherwise grid mills tend to clog on the rushes. In some grid mills in secondary service, especially with new steel and exceptionally coarse feed, the motors cannot be kept up to full-load power on account of incipient clog-up and consequent peak loads that tend to follow slugs of segregated coarse feed material.

Circulating loads vary materially with size of feed, feed rate, number of rows of hammers, extent of wear of hammers and breaking plates, moisture content, and resulting effect on screen efficiency. The fines returned from an inefficient screen tend to cut down crusher capacity, thus aggravating the circulating-load build up. Circulating load at Nonnis Dam with $1\frac{1}{2}$ - and 2-in. grid spacing and $\frac{1}{4}$ -in. closing screen ranged from 50 to 100% of new feed; the circulating load all passed a 1-in. square hole.

Free fall of feed from feed chute to crushing zone determines penetration of hammer circle by the feed particles, and thereby affects both capacity and wear. If free fall is too

**District Court's Findings of Fact and
Conclusions of Law**

(610)

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[SAME TITLE]

FINDINGS OF FACT

1. *Action, Parties, Jurisdiction*

1.1 This is an action for infringement of claim 9 of Proler reissue patent Re. 25,034 (hereinafter "Proler re-issue patent").

1.2 Plaintiff, Proler Steel Corporation, a Delaware corporation, the owner of the Proler reissue patent, has its principal place of business in Houston, Harris County, Texas, and is licensed to do business in the State of California.

(611) 1.3 Defendants, Luria Brothers & Company, Inc., a Delaware corporation, and its wholly owned subsidiary, Lipsett Steel Product, Inc., a New York corporation, have since September, 1963, produced a fragmentized ferrous scrap called Lurmet at their plant in Vernon, California.

1.4 The jurisdiction of this court is predicated upon 35 U.S.C. §281, §1338(a) and §1400(b).

*Findings of Fact**2. Proler Reissue Patent*

2.1 The Proler reissue patent is a reissue of U. S. patent No. 2,943,930 issued July 5, 1960, now surrendered (hereinafter "original Proler patent"). U. S. patent No. 2,943,930, in turn, was a continuation of an abandoned application Serial No. 677,514, filed August 12, 1957 (hereinafter "abandoned Proler application").

2.2 The original Proler patent and the Proler reissue patent describe a process for the upgrading of raw ferrous scrap which includes the steps of (1) shredding or fragmentizing the raw ferrous scrap in a hammermill, (2) separating the more ferrous bearing material using a magnetic separator, (3) roasting the ferrous fragments in a kiln to remove adhered nonferrous material, and (4) passing the fragmentized ferrous scrap between rolls for the purpose of compacting and balling it up to increase the bulk density of the product while maintaining the individuality of the separate pieces.

2.3 During the prosecution of the original Proler patent and the abandoned Proler application the plaintiff through its attorneys made the following statements in (612) support of its position that the roasting step was an important and novel step of the Proler process and one which distinguished it over prior art patents cited by the Patent Office:

"The process claims have been revised and consolidated into two new claims which are believed to better emphasize the novel features of the process. These novel features include the following:

* * *

- (2) The reduction of the raw material to a fluent state and the concentration thereof *followed by the*

Findings of Fact

purification thereof in a kiln.” (Exhibit F, attached to defendant’s memorandum, page 22; emphasis added)

* * *

“Applicant will agree that the kiln treatment is an important step in the invention, but not just kiln treatment alone, and not kiln treatment of just any material. Simes is not concerned with junk yard scrap and does not produce any upgraded scrap at all since the borings are fed directly into a steel furnace. Simes kiln heats has (sic) borings to ‘volatilize’ the water and oil or, with the addition of coke, to reduce oxides. His kiln is operated at 600 to 800 degrees Fahrenheit (page 2, column 2, lines 69-70). Applicant on the other hand operates at a much higher temperature not only to oxidize the combustible (613) materials but to melt off the non-ferrous metals and crack off the refractory materials.”

* * *

“Applicant will admit that size reduction and magnetic separation are old steps, e.g. as shown in the cited supplemental German reference, or in the Gregg patent (*supra*), but there is no suggestion of the combination of such steps with the steps of roasting the resultant material and then rolling the roasted scrap.” (Exhibit F, page 23)

* * *

“* * * None of the references shows a kiln roasting step both operating at the temperature specified by applicant and used for applicant’s purpose.” (Exhibit F, page 25)

* * *

Findings of Fact

“* * * Gregg does not even suggest a temperature of 1300° F to 1800° F for roasting scrap. He desired only to remove organic materials, which would be burned off at much lower temperatures. He does not suggest the use of higher temperatures. These higher temperatures are to a large extent responsible for the tremendous commercial success of applicant's process, since it is only by the use of such temperatures that low melting point alloys and ceramic materials which are adhered to the ferrous materials can be removed. Furthermore hardened steels are drawn by these high temperatures, so that they are more easily (614) compacted.

* * *

“Somes adds nothing to the teaching of Gregg. The only portion of his disclosure which is pertinent is his heating of borings to drive off water and cutting oils. This is done at 600 to 800° F. There is no suggestion of using any temperature anywhere near as high as that of applicant's process, and indeed such high temperatures are neither necessary or desirable in Somes' process. Somes' metal borings contain no low melting alloys, nor any ceramic materials, nor any other material which requires a temperature of 1300 to 1800° F to purify his material. The Examiner states that the desired temperature range is easily derivable by routine experiment, but this position is untenable without some showing of the desirability of the high temperatures. The disclosure of Somes does not suggest that any experimentation is desirable to derive the proper temperature range; in fact, he specifies a temperature range for his process, thereby eliminating the necessity of experimentation. Gregg, on the other hand, does not specify a temperature range, but sets forth standards by which one may derive the desired

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temperature range by routine experiment. This standard, however, is a *relatively low temperature to remove organic material*. This obviously leads directly away from applicant's teaching of a (615) high temperature to melt off low-melting metals and to crack off ceramic materials. Therefore there is no basic (sic) in either of the references for deriving applicant's temperature range by routine experiment." (Exhibit F, pp. 34-35)

* * *

"* * * The conducting of the roasting step after the milling *is of major importance in applicant's process*, since materials which are removed by the roasting are more readily contacted by the high temperatures. Chamberlain does his heating after the scrap has been compressed into a bale. Obviously such heating cannot effectively burn off combustibles, or cause ceramics to crack off. (Exhibit G, attached to defendants' memorandum, page 19; emphasis added)

2.4 All of the claims of the original Proler patent were limited to a process or a product made by a process which included the roasting step.

2.5 Five months after the original Proler patent issued the patentee Proler filed an application to reissue the patent and broaden it by the addition of claims 9 and 10 which are not limited to a process which includes the roasting step.

2.6 In the application for the reissue patent the patentee Proler stated in the oath that the original Proler patent was "partly inoperative by reason of a defective specification, in that the claims in the said patent do not include claims broad enough to provide full protection to

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the inventor". Proler further stated that the failure to (616) broadly claim the invention in the original Proler patent "arose through error and without any deceptive intention on the part of Deponent". (Pp. 9 and 10 of Exhibit H attached to defendants' memorandum)

2.7 There is nothing in the file of the Proler reissue patent which states the facts constituting the "error" relied on as the basis for the reissue patent.

3. *Claim 9 of the Proler Reissue Patent Recites
Nothing More Than the Known Functions of
Apparatus Old in the Art*

3.1 Plaintiff has admitted that the process of the Proler reissue patent could be practiced using a hammermill, magnetic separator and rolls which were conventional at the time of the alleged invention by the patentee (plaintiff's response to defendants' interrogatories 10B, C and E; also Pretrial Conference Order 111(k)).

3.2 The Proler reissue patent shows schematically a conventional hammermill 11, a conventional magnetic separator 16, and conventional rolls 19, and fails to describe any novel design or structure for these pieces of equipment.

3.3 The steps in claim 9 of the Proler reissue patent of shredding automobile scrap in a hammermill and then magnetically separating the ferrous fragments from the nonferrous material are steps which have been practiced by a scrap processor, Los Angeles By-Products Company of Los Angeles, California, during the 1930s and 1940s (plaintiff's response to defendants' interrogatory 13F).

3.4 The Gregg patent No. 2,059,229 (a copy of which is attached to defendants' memorandum as Exhibit B)

Findings of Fact

for "Method of Preparing Discarded Automobile Fenders and (617) Similar Material for Melting Purposes," issued November 3, 1936, describes a method for preparing "a clean high-grade scrap iron" (p. 1, column 1, lines 35-36) from, *inter alia*, "old discarded automobile bodies" (page 1, column 2, line 6) by the steps of (a) shredding or fragmentizing automobile scrap in a hammermill, (b) magnetically separating the ferrous fragments from the non-ferrous material, and (c) either discharging the ferrous fragments "into a suitable storage bin" (page 2, column 2, lines 1 and 2) or delivering it to a hopper of a baling press in which it is compacted into bales.

3.5 Sam Proler, the patentee and president of plaintiff, has admitted that he was familiar with rolls and their function prior to making his invention, and in his deposition testimony described the commercial use of rolls by plaintiff prior to 1956 for compacting tin cans (Proler deposition, pages 173-175; also plaintiff's response to defendants' interrogatory 13F).

3.6 Patentee Proler has testified that the compacting and balling up function of the rolls 19, as recited in the third step of claim 9 of the Proler reissue patent, is the ordinary flattening and compressing function of conventional rolls:

"Q. So flattening, in your mind, is the same as balling up; is that right? A. If it increases the density by decreasing the size of the piece.

Balling up may not be making it perfectly flat, but making it smaller in size, the piece itself, than it was before you did anything (618) to it." (Proler deposition, page 171.)

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3.7 In the process of claim 9 of the Proler reissue patent a conventional hammermill is used to perform its known function of shredding ferrous scrap, a magnetic separator is used for its known function of separating the ferrous fragments from the nonferrous material, and the rolls are used to perform their known function of compacting the ferrous fragments. All three pieces of equipment have been used commercially by scrap processors, including plaintiff, to perform these functions long prior to April 1957, the date of invention alleged by plaintiff.

4. Defendants' Accused Process Does Not Infringe Claim 9 of the Proler Reissue Patent

4.1 The commercial operation of defendants' Vernon plant began in September 1963, and from that date until April 1965 defendants produced a fragmentized scrap which defendants call Lurmet by a process which included the steps of shredding raw ferrous scrap in a hammermill and then magnetically separating the ferrous pieces from the nonferrous material.

4.2 Plaintiff has conceded that the steps of shredding ferrous scrap in a hammermill and then magnetically separating the ferrous pieces from the nonferrous material are old and do not infringe the Proler reissue patent (quotation from Exhibit 4, page 23, in finding 2.3 above; plaintiff's response to defendants' interrogatories 6C and 14D).

4.3 In April 1965 defendants modified their commercial operation by installing in their hammermill grates having larger openings than the grates then currently in use (619) (although grates previously used in defendants' process had such larger openings) and began separating out the larger pieces of ferrous scrap from the product and

Findings of Fact

recycling them through the hammermill to produce Lurmet in the same density range as the product made prior to April 1965.

4.4 It is the operation of defendants' plant subsequent to April 1965 that plaintiff charges infringes claim 9 of the Proler reissue patent. More specifically, plaintiff charges that the function of the hammermill on the recycled scrap is the same or the equivalent of the function of the compacting rolls in plaintiff's patented process described in the third step of claim 9 as "individually compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces."

4.5 The separation of larger pieces of material fragmented in a hammermill and recycling those larger pieces in a hammermill is a standard and recognized procedure for operating a hammermill and has been described in textbooks long prior to the date of the alleged invention of the Proler reissue patent (Hassialis affidavit attached to defendants' memorandum as Exhibit E).

4.6 The Proler reissue patent discloses only the use of rolls to carry out the compacting step of claim 9 "while maintaining the individuality of the separate pieces."

4.7 The function of defendants' hammermill is to shred and subdivide the pieces of ferrous scrap to increase their density, thereby destroying the individuality of the pieces (Hassialis affidavit, Exhibit E), in contrast to the function of the rolls in the Proler reissue patent which (620) compact the pieces of ferrous material to increase its density "while maintaining the individuality of the separate pieces."

Findings of Fact

4.8 The patentee Proler does not dispute that the recycling of fragmentized scrap to the hammermill results in further shredding of the pieces and testified as follows:

“Q. I thought you had originally testified that some of the material originally put in and shredded continued around several cycles, around the rotor before it came out? A. That is what I say, it shreds and comes out in small pieces.

“Q. Even though a smaller piece? A. Even though a smaller piece, it is shredded, comes out in small various-sized pieces, smaller than the opening of the grate.

“Q. Why isn't the recycled material shredded too as it goes back in for recycling? A. It is, and that is the reason we are here.

“Q. Right, but I don't see how you distinguish between the two. A. Well, they recycle the material that is larger and heavier, although it came through the grate openings, to recycle back through the mill to reduce the size and increase the weight.”

(Proler deposition page 203, line 13, through page 204, line 7; see also Hassialis affidavit.) Proler also testified that the same shredding occurs when the ferrous scrap is first fed into the hammermill:

“The first time you put it through, you put in a whole car or a stove or a refrigerator, and (621) it shreds it up into small pieces.” (Proler deposition, page 25, line 24, page 26, line 2.)

* * *

“Actually, it shreds the material up. There are big pieces such as automobiles, stoves, refrigerators, ice boxes, and the hammers rip through and tear and shred the big pieces up and throw them around, and

Conclusions of Law

if they are small enough to go through the grate, they go through the grate opening size, and if they are bigger, they go around, and it shreds them and it tears them up again, and they come out shredded and in smaller pieces and fall through the openings.” (Proler deposition, page 43, lines 5-13.)

CONCLUSIONS OF LAW

1. Claim 9 of the Proler reissue patent is invalid as an aggregation of old steps which are nothing more than the known functions of old elements. These old elements when brought together fail to produce any result which would be unexpected, unusual or surprising to a person of ordinary skill in the art of processing scrap, or any additional or different function when brought together than they normally perform separately—the hammermill shreds, the magnetic separator separates the ferrous pieces from the nonferrous material and the rolls compact the ferrous pieces.

2. Shredding recycled ferrous scrap in defendants’ hammermill is not the same as or the equivalent of the step of compacting shredded scrap between rolls, described in the third step of claim 9 of the Proler reissue patent as “individually (622) compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces.”

3. The functional language of claim 9 of the Proler reissue patent, properly construed pursuant to 35 U.S.C. §112, is not infringed by defendants’ operation of shredding ferrous scrap in a hammermill, separating the ferrous pieces from the nonferrous material and feeding the larger

Conclusions of Law

ferrous pieces along with raw scrap through the hammer-mill for further shredding and subdivision.

4. Claim 9 of the Proler reissue patent is invalid on the ground that it fails to satisfy the requirements of 35 U.S.C. §251 in that it covers an invention different from the one disclosed in the original Proler patent.

5. Claim 9 of the Proler reissue patent is invalid on the ground that it fails to satisfy the requirements of 35 U.S.C. §251 in that the defect of the original Proler patent did not arise through error.

6. Claim 9 of the Proler reissue patent is invalid on the ground that the applicant for the Proler reissue patent did not make the requisite showing of the circumstances to support a conclusion "that the failure to include claims broad enough" in the original Proler patent "arose through error."

7. The Commissioner of Patents was without authority to reissue the original Proler patent by reason of the defective oath filed in support thereof which failed to show any error or how the error arose as is required by 35 U.S.C. §251 and Rule 175(4) of the Rules of the United (623) States Patent Office in Patent Cases.

Dated this 27th day of September, 1967.

Warren J. Ferguson
UNITED STATES DISTRICT COURT JUDGE

Judgment on Motion for Summary Judgment

(625)

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[SAME TITLE]

This cause having come on for hearing on the motion of defendants, Luria Brothers and Company, Inc., and Lipsett Steel Products, Inc., for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure; the Court having considered the pleadings, affidavits and exhibits filed herein, and having heard the argument of counsel; and the Court finding there is no genuine issue of fact to be submitted to trial, and finding that defendants are entitled to judgment as a matter of law;

IT IS ORDERED, that defendants' motion for summary judgment be and the same is hereby granted; and therefore

IT IS ORDERED, ADJUDGED and DECREED that claim 9 of plaintiff's reissue patent, Re. 25,034, is invalid and (626) not infringed; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the action be dismissed and that defendants recover from plaintiff their costs.

Dated this 27th day of September, 1967.

Warren J. Ferguson
UNITED STATES DISTRICT JUDGE

**Decision of Ferguson, J., on Appellant's Motion for
Reconsideration of Grant of Motion for
Summary Judgment**

* * *

(143) The Court: Well, the reason that I gave a lot of time to this case in the motion for reconsideration—you may be seated, Mr. McConn—I am just completing—I am just starting my second year here on the Federal bench. And there is a tendency when you are young and just coming on to be hasty. And I wanted to make certain—at least in my own mind—that my ruling in granting the summary judgment was not ill-advised.

There hasn't been anything presented to me which requires me to feel that I was ill-advised, or that I should reconsider my present ruling.

I think the case basically is summed up, Mr. McConn, by Mr. Graves and your reference to your getting up to the podium yesterday and showing this picture of this fellow holding this piece of scrap in his hand and stating that, I could talk about this to a jury for at least 30 minutes.

There is no question about it that there are a lot of things in this case that you could take a lot of (144) time in talking about to a jury. But I think the end result is that it is probably more talk than substance.

And I am more convinced that my present rulings are correct. But at least I have done all I can when you were in chambers to make sure that your and your client's rights are fully protected on appeal. And I don't want to do anything which jeopardizes your substantive and procedural rights. I just merely happened to disagree with your position concerning the patent. But I certainly agree with your position as an advocate that you have the right to pursue to the limit.

Therefore the motion for reconsideration will be denied.

* * *

Statutes**35 U.S.C. §103****§103. Conditions for patentability; non-obvious subject matter**

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

35 U.S.C. §112**§112. Specification**

* * *

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. §251**§251. Reissue of defective patents**

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he

Statutes

had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

* * *

Rules

Rule 175(a)(4) of Rules of Practice in Patent Cases

175. *Reissue oath or declaration.* (a) Applicants for reissue, in addition to complying with the requirements of the first sentence of rule 65, must also file with their applications a statement under oath or declaration as follows:

* * *

(4) Particularly specifying the errors relied upon, and how they arose or occurred.

Fed. R. Civ. P. 56(c)

(c) *Motions and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

Fed. R. Civ. P. 56(e)

Rule 56

* * *

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirma-

Rules

tively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

U.S.D.C. C.D. Calif. Civ. R. 3(g)(1) and (3)**Rule 3**

* * *

(g) Motions for Summary Judgment:

1. There shall be served and lodged with each motion for summary judgment pursuant to Rule 56 of the F. R. Civ. P. proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

* * *

3. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.

Nos. 22495 and 22495-A

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PROLER STEEL CORPORATION, *Appellant*,

v.

LURIA BROTHERS & COMPANY, INC.
and LIPSETT STEEL PRODUCTS, INC., *Appellees*.

REPLY BRIEF FOR APPELLANT

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MAY 27 1968

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Nos. 22495 and 22495-A

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PROLER STEEL CORPORATION, *Appellant*,
v.
LURIA BROTHERS & COMPANY, INC.
and LIPSETT STEEL PRODUCTS, INC., *Appellees*.

REPLY BRIEF FOR APPELLANT

I.

SUMMARY OF THE ARGUMENT

A process patent may not be held to be invalid merely because equipment known in the prior art may be used to practice the process.

In the alleged defense of "aggregation" the law is clear that appellees have the burden of establishing (1) that all of the *steps* in Claim 9 were old at the time of the invention, and (2) that the combination of the steps did not produce any "new, useful, and unexpected result." The record in this case clearly raises genuine issues of material fact on both of these matters.

Appellees have not commented on any of the six *factual* tests laid down by the Supreme Court in *Graham v. Deere*, 383 U.S. 1, 15 L.Ed.2d 545 (1966) as material to the alleged defense of "obviousness." The record in this case raises genuine issues of material fact on each of these tests.

It is immaterial what apparatus appellees use to perform the third step of Claim 9 so long as they perform the step. Their own officers and employees admit that in appellees' third step they individually compact the pieces, which is the third step of Claim 9 of the Patent.

There are genuine issues of material fact on infringement as to (1) whether appellees' act of running previously shredded ferrous scrap through their hammer mill constitutes "individually compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained"; (2) whether the language in Claim 9 "while maintaining the individuality of the separate pieces" was intended by the patentee to distinguish over the prior art practice of baling or was intended by the patentee to exclude any subdivision of the pieces; and (3) whether appellees in performing the third step of their process are merely following the prior art process of a closed circuit grinding of ores and minerals.

Appellees do not deny the existence of a genuine issue of material fact on whether Claim 9 covers the invention disclosed in the original patent. The district court erred in deciding this fact issue on summary judgment.

The record before the patent office shows conclusively that it was error without deceptive intention for Sam Proler to fail to claim the purifying step more broadly in his original patent and that Mr. Proler's reissue oath described the error. At the very least, genuine issues of material fact are raised on both inquiries, and further, on whether, without the oath, the commissioner had sufficient evidence before him to find the error.

II. ARGUMENT

A. VALIDITY OVER PRIOR ART

1. Appellant's Patent Covers a Process, Not Equipment.

Appellees' entire argument on validity is based on the clearly erroneous assumption that if known equipment may be used to perform the steps of Claim 9, the claim is invalid.

In *Expanded Metal Company v. Bradford*, 214 U.S. 366, 53 L.Ed. 1034 (1909), there was involved a process for making expanded metal, using knives, the age-old function of which was to cut, and "mechanism for the shifting of the sheet and of the knives" which was already in use in machines for expanding metal. In upholding the patent on the process the Supreme Court held that "The important thing in this patent is a method of procedure, not the particular means by which the method shall be practiced". *Expanded Metal*, supra, at 381.

Expanded Metal definitely settled the law to the effect that "operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines" may be the subject of a process patent. *Deller's Walker on Patents*, Second Edition, §15, p. 106.

Claim 9 does not describe any machine or the function of any machine. It sets out three steps to be applied to a particular material in order to produce a particular product. Several means may be contemplated for the accomplishment of each step. In the first step the material is sized. To accomplish this step one might use a cutting torch, a shear or a hammer mill. In the second step the material is separated from non-ferrous contaminants. To accomplish this step one might use hand picking, a kiln,

a trommel, a screen, or a magnetic pulley. In the third step the material is densified by individual compaction of the pieces. To accomplish this step one might use a hammer mill operating on the individual pieces (which have already been sized), a hammer, a hand tamp, or a rolling mill. In suggesting a hammer mill to accomplish the first step, a magnetic pulley to accomplish the second step, and rolls to accomplish the third step, appellant was merely following the statute which requires that the patentee set out the best mode contemplated of carrying out his invention. 35 U.S.C. §112.

Sam Proler, in the first trial of his invention, used a hand tamp to compact the individual shredded pieces. As of this time he had not even thought of rolls as a better instrumentality for accomplishing this step (Proler deposition, p. 171). The significance of this fact is that his invention was a series of *steps* to be performed on the material, not the functions of the machines which he later decided to employ.

In the words of the Supreme Court in *Waxham v. Smith*, 294 U.S. 20, 22, 79 L.Ed. 733 (1935):

“A method, which may be patented irrespective of the particular form of the mechanism which may be availed of for carrying it into operation, is not to be rejected as ‘functional,’ merely because the specification shows a machine capable of using it.”

The only case cited by appellees involving a process patent is *Hunter Douglas Corp. v. Lando Products*, 215 F.2d 372 (9th Cir. 1954), wherein a summary judgment was not in issue. The opinion in *Hunter* discloses that in the prior art the same *steps* as those in the patent had been combined *in the same sequence*, treating the *same material*, for the *same purpose*, and had achieved the *same result*. The decision obviously has no materiality to this case.

2. Fact Issue on Whether All of the Steps in Claim 9 Were Old.

Appellees have not denied that their first burden in upholding summary judgment on the defense of "aggregation" is to show that no fact issue is raised on whether all the steps of claim 9 were old. *Coleman Co. v. Holly Mfg. Co.*, 233 F.2d 71, 78 (9th Cir. 1956).

Appellees have failed to show there is no fact issue on whether individual compacting of shredded scrap was new or old at the time of Sam Proler's invention. They have instead dwelt on the fact that rolls were used for other purposes before the invention. This is beside the point. *Carnegie Steel Co. v. Cambria Iron*, 185 U.S. 403, 424, 425, 46 L.Ed. 968 (1902):

"A mechanical patent is anticipated by a prior device of like construction and capable of performing the same function; *but it is otherwise with a process patent*. The mere possession of an instrument or piece of mechanism contains no suggestion whatever of all the possible processes to which it may be adapted. . . . If the mere fact that a prior device might be made effective for the carrying on of a particular process were sufficient to anticipate such process, the absurd result would follow that, if the process consisted merely of manipulation, it would be anticipated by the mere possession of a pair of hands." (Emphasis added).

See also *Elrick Rim Company v. Reading Tire Machinery Co.*, 264 F.2d 481 (9th Cir. 1959).

The only evidence appellees rely on for their proposition that step 3 of claim 9 was old is the testimony of Sam Proler with respect to flattening whole tin cans in rollers. This previous practice of Mr. Proler is not the same as step 3 of claim 9, because the evidence (Proler affidavit, Ex. B) shows (a) the rolls operated on tin cans,

whereas step 3 deals with processing shredded pieces of scrap; (b) the flattening of the cans was done merely to facilitate shipment before sending the cans to a plant for processing, whereas step 3 of claim 9 is an integral step in the patented process; (c) after being flattened (merely for shipment), the cans were processed as a product for use in the copper mines, where the end product was intentionally left ragged or fluffy for use as precipitation iron, whereas in the patented process the product is an entirely different one, which is purposely densified for use as scrap in steel mills; and (d) in the Proler patent it is stated that tin plate (tin cans) is undesirable in the process (R. 338).

The question of whether Mr. Proler's use of rolls to flatten tin cans for shipment is the same as step 3 of claim 9 in the Proler process is one of fact, as clearly held in *Cee-Bee Chemical Co. v. Delco Chemicals*, 263 F.2d 150 (9th Cir. 1958), wherein summary judgment for the defendant was reversed:

“Appellee argues in effect that a ‘soapy’ spray and a ‘water-rinsable, solvent-miscible’ spray are one and the same. This may be true, but to so decide necessitates the determination of a *question of fact* which appellant disputes, as revealed by the Whitcomb affidavit.” *Cee-Bee*, supra, at p. 153. (Emphasis added).

3. Fact Issue on Whether the Process Produced Any New, Useful or Unexpected Result.

Appellees have not denied that in order to sustain the summary judgment on the defense of “aggregation” they have the *additional* burden of showing there is no fact issue on whether there was anything new, useful, or unexpected produced as a result of the combination of the three steps in the Proler patent, *Coleman*, supra, at 78.

Appellees have failed to meet that burden. They haven't even referred in their brief to the evidence from their own officials and employees to the effect that the product which was the result of that combination was new, useful, unexpected, even "revolutionary". Appellees do not dispute that the process invented by Mr. Proler produced for the very first time a fluent mass of clean shredded scrap having a density high enough for use by the steel mills.

Appellees say the product is now in the public domain. But it is undisputed that the product did not exist before Sam Proler's invention. The product of a process can constitute the new, useful, and unexpected result. *National Latex Products Company v. Sun Rubber Company*, 274 F.2d 224, 239 (6th Cir. 1959). In the *National Latex* case the patent did not cover the product.

4. Factual Tests on Obviousness.

Appellees don't even argue that it was obvious, at the time of the invention, to *combine the three steps* in the Proler process to obtain a pure, dense, steel scrap in flowable form. They dodge this argument, which is the true legal test (*U. S. v. Adams*, 383 U.S. 39, 15 L.Ed.2d 572 (1966)), because the evidence material to the six *factual* tests on obviousness laid down by the Supreme Court in *Graham v. Deere*, supra, as outlined in appellant's principal brief, is overwhelmingly in appellant's favor on the issue of obviousness of the invention.

An excellent illustration of the *Graham v. Deere* tests may be found in the recent case of *National Dairy Products Corp. v. Borden Co.*, 157 U. S. P. Q. 227 (7th Cir. 1968). The court there stated that it was a strong indication of non-obviousness that there had been prior unsuccessful attempts to solve the long-felt need, that

the patented process successfully met the need, and that the individual steps were long available but no one had discovered the process until the patentee. (*National Dairy*, supra, at 230, 231).

Appellees' argument on obviousness is only that it was obvious that the shredded material would be compacted when it was passed between rolls. But the question is whether it was obvious to *combine the steps*, not whether, once they were combined, those skilled in the art would know what result to expect. *U. S. v. Adams*, supra. Viewed after the event, many patentable inventions seem obvious. *National Sponge Cushion Co. v. Rubber Corp. of Cal.*, 286 F.2d 731, 735 (9th Cir. 1961); and *Neff Instrument Corp. v. Cohu Electronics, Inc.*, 298 F.2d 82, 88 (9th Cir. 1961). ". . . [T]he fact that the solution to a problem is simple, or appears so, when viewed in retrospect, does not mean the solution was obvious when it was made. . . ." The courts must "guard against the exercise of hindsight in assessing the obviousness of a given improvement in the art." *National Dairy*, supra, at 231.

The prior art now cited by appellees as being grounds for summary judgment for obviousness discloses nothing that was not disclosed in the prior art considered by the Patent Office. The Gregg patent was the basic reference considered by the Patent Examiner (R. 388, 399, 440, 507), and the Near patent* (Ex. C), also considered by the Examiner (R. 388, 507), shows crushing of ferrous scrap by a crushing belt 11 and a compressor roll 77 *before* the material is fed into a hammer mill for shredding. The presumption of validity of an issued patent is strengthened when the closest prior art was considered by the Patent Office. *Neff Instrument*, supra, at 86, 87.

* Both of these patents were brought to the attention of the Examiner by the applicant (R. 384).

5. Summary of Fact Issues on Validity Over Prior Art.

It is clear that the evidence in the record raises genuine issues of material fact on the defense of "aggregation" as follows:

a) Whether all of the steps of claim 9 were old, i.e., whether Sam Proler's flattening of tin cans was the same as step 3 of claim 9 and, if so:

b) Whether the process of claim 9 *as a whole* produced a result which is "new, useful, and unexpected".

It is further clear that the evidence in the record raises genuine issues of material fact on each of the six *factual* tests on non-obviousness laid down by the Supreme Court in *Graham v. Deere*, i.e.: (a) whether there was prior art showing the third step of claim 9 (Appellees do not deny the *combination* is novel); (b) whether there were differences between the tin can operation and the third step of claim 9; (c) whether a person of ordinary skill in the art would have combined the steps of claim 9; (d) whether the process was a commercial success; (e) whether there was a long felt and unsolved need; and (f) whether others skilled in the art failed to solve the problem.

B. INFRINGEMENT

1. Appellant's Patent Covers a Process, Not Equipment.

Appellees wrongfully interpret the third paragraph of 35 U.S.C. §112 in furtherance of their attempt to concentrate on the *equipment* suggested as useful to perform the process, rather than on the *steps* of the process.

The third paragraph of 35 U.S.C. §112, as applicable to a process patent, reads as follows:

“An element in a claim for a combination may be expressed as a means or STEP for performing a specified function without the recital of structure, material or ACTS in support thereof, and such claim shall be construed to cover the corresponding structure, material or ACTS described in the specification and equivalents thereof.” (Emphasis added).

STEP goes with ACTS and is unrelated to “structure” and “material”. It has been uniformly held for at least the past 90 years that in considering whether a method claim is infringed, it is immaterial what apparatus is disclosed by the patent and used by defendant. Only the acts are to be compared. *Cochrane v. Deener*, 94 U.S. 780, 787, 24 L.Ed. 139 (1877), *Sbicca-Del Mac v. Milius*, 145 F.2d 389, 397 (8th Cir. 1944).

In the case at bar the function is densification, and the claim *does* recite the act in support thereof, namely, individually compacting and balling up. Therefore there is no need to refer to the description to determine what act Proler disclosed to achieve densification. However, if one did turn to the description he would find that Proler states that to densify the material it is to be individually compacted (R. 338, col. 2, lines 62, 63). Since defendants admittedly perform the identical act of individually compacting, there is no need to consider the question of what other acts whose function is densification might be equivalent to individual compacting within the scope of the patent.

Under *Cochrane* and *Sbicca-Del Mac*, supra, it is clear that the third step of claim 9 may not be limited to the function of rolls or their equivalent. Appellees have cited no law to the contrary.

The erroneous construction placed on Section 112 by appellees would have the effect of narrowing claim 9 to the same scope as claim 10, which specifies rolls, thus

destroying the well settled right of patentees to have claims of varying scope. See *Application of Lundberg*, 244 F.2d 543 (C.C.P.A. 1957).

2. Appellees Use the Individually Compacting Step.

Appellees' desire to compare the equipment used in their process with the equipment suggested by the patent is understandable in view of the evidence in the record (cited in appellant's original brief at pp. 44-48) which establishes that they are performing step 3 of claim 9.

No less a person than Mr. Williams, the man who designed and built appellees' equipment, has testified that claim 9 reads directly on the operation conducted by appellees in Los Angeles (Robert Milton Williams deposition, June 21, 1967, pp. 24-26). He was particularly emphatic on the identity of step 3 in the two processes:

"Q. And that material [the 45% which is sent through the hammer mill in appellees' step 3] that is recycled back through the hammer mill goes through the process of individual compaction and balling up of the pieces?

"A. It goes through the process of being hammer milled again, yes.

"Q. And you have agreed with me that part of that, at least, consists of compacting and balling up the individual pieces?

"A. Undoubtedly. Undoubtedly.

"Q. To further densify the material?

"A. That is correct.

"Q. While maintaining the individuality of the separate pieces?

"A. I would assume that is true.

"Q. From your experience?

"A. Yes.

"Q. Whereby fluent mass is obtained?

“A. Yes. That means it would flow. Yes, down a conveyor or something.” (Material in brackets supplied).

Since they perform every operation in the claim, appellees cannot avoid infringement merely because some subdivision of the fragments also takes place. *Neff Instrument*, supra at 89, 90.

The affidavit by Prof. Hassialis supports the inference that most of the pieces counted by him were merely small chips. By his figures, 35% of the pieces were between $\frac{1}{2}$ inch and 1 inch in their maximum dimension. There might well have been 35% more between 1 inch and $1\frac{1}{2}$ inches. If this is true there would be left only a few more than the original number of shredded pieces sent through the hammer mill in the experiment. Certainly the $\frac{1}{2}$ inch to $1\frac{1}{2}$ inch pieces are small chips compared to the 6 to 10 inch dimensions of the original pieces. A piece $1\frac{1}{2}$ inches square is only $2\frac{1}{4}\%$ of the area of a piece 10 inches square. On a weight basis, the amount of steel in the pieces under $1\frac{1}{2}$ inches would be insignificant. This affidavit is more significant in what it omits than in what it includes. It nowhere advises the court how many sizeable pieces were left or what the hammer mill did to them.

Attorneys for appellee argue that it is illogical to say a hammer mill can perform the first step of claim 9 as well as the third step. The record is clear, however, that the action of the five inch wide hammers in the hammer mill on an entire car body or stove is different from the action of those same five inch wide hammers on a malleable piece of scrap no greater than ten inches in its largest dimension. The larger the piece the more the tendency of the hammer to shred it; the smaller the piece the more the tendency to compact and ball it up (Sam Proler deposition, pp. 25, 26). A hammer mill has many

functions, depending on the type of material which is fed into it. When rocks or ore are fed into it, its function is to shatter.

The references in the evidence to a "nuggetizer" are not immaterial, as claimed by appellee. The record establishes that the "nuggetizer" used in the pilot plant operation at Williams Patent Crusher & Pulverizer Company to compact the shredded pieces was a hammer mill, (Exs. D, M) and there is no evidence that this hammer mill was specially designed. Further, Mr. Magness, the Vice President of appellee Luria in charge of this operation, equated in writing the function of the "nuggetizer" to that of the hammer mill in appellees' process when the shredded fragments are sent through it. (Ex. N.)

Appellees unreasonably argue that the language "while maintaining the individuality of the separate pieces" should be construed to exclude a process which includes some further subdivision of the shredded pieces. This language must be interpreted consistently with the intent manifested in the record before the Patent Office, i.e. to the effect that it distinguished only over the prior art bundles or bales. *U.S. v. Adams*, supra at 48, 49; *Bianchi v. Barili*, 168 F.2d 793, 799, 800 (9th Cir. 1948). At the very least, in view of the record, a fact issue is raised as to how this language in the claim should be interpreted. *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 255, 256 (9th Cir. 1957).

The affidavit by Prof. Hassialis certainly cannot establish conclusively that by sending shredded, malleable, steel scrap through the hammer mill in the third step of their process, appellees are merely following the prior art "closed circuit" grinding of ore and minerals. Dr. Pennington's affidavit (Ex. T) points out that none of the texts cited by Prof. Hassialis mentioned the processing of steel

scrap, "or any other material remotely similar thereto". The evidence (appellant's original brief, pp. 44-48) is to the effect that the action of a hammer mill on shredded, malleable, steel scrap is that of individual compaction of the pieces, which would be impossible to achieve on ore or minerals. Further, in none of the three texts are there any references to a method for producing a shredded product of a particular density (which is what appellees are admittedly doing in the third step of their process. [Burlingame deposition, June 1, 1966, pp. 20-22]).

The patented process is a procedure for treating a particular material in a particular manner to achieve a desired result. There is no evidence of such treatment of such material to achieve such a result in the prior art.

At the very least, therefore, a genuine issue of material fact is raised on whether appellees are merely following a prior art process.

3. Fact Issues on Infringement.

Certainly under the record in the case genuine issues of material fact are raised as follows:

a) Whether the act of running the previously shredded ferrous scrap through the appellees' hammer mill constitutes "individually compacting and balling up the pieces of the more ferrous bearing shredded material to densify it while maintaining the individuality of the separate pieces, whereby a fluent mass is obtained";

b) Whether the language in claim 9, "while maintaining the individuality of the separate pieces", was intended by the patentee to distinguish over the prior art practice of baling or was intended by the patentee to exclude subdivision of the pieces; and

c) Whether appellees are merely following the prior art process of a closed circuit grinding of ores and minerals.

C. THE REISSUE

1. Same Invention.

Appellees do not deny in their brief that the alleged defense to the effect that claim 9 is not for the invention originally disclosed raises an issue of fact. Instead they argue that "the court below was certainly far more competent than a jury to . . . determine whether . . . claim 9 is for the same invention disclosed in the original Proler patent" (p. 17 of appellees' brief).

But on a motion for summary judgment the court cannot decide any fact issues. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468, 7 L.Ed.2d 458 (1962). Furthermore, the court may not decide fact issues on summary judgment merely because all of the evidence on such issues is in documents which are before the court. *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F.2d 353, 356 (9th Cir. 1955). Where the facts are undisputed but reasonable men might draw different conclusions from them the question is one of fact to be settled by the jury. *Gunning v. Cooley*, 281 U.S. 90, 94, 74 L.Ed. 720 (1930). It is especially necessary to be cautious in making a determination on whether the evidence raises genuine issues of material fact where a jury trial has been demanded. *Cameron v. Vancouver Plywood Corporation*, 266 F.2d 535, 540 (9th Cir. 1959).

Appellees' brief on this defense is merely an argument on the facts. They attempt to establish an analogy between the facts in this case and those in *U. S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corporation*, 315 U.S. 668, 86 L.Ed. 1105 (1942), wherein summary judgment was not involved. But the facts in

the present case which they rely upon are not analogous to those considered in *U. S. Chemicals*.

The first four items enumerated by appellees on pages 42 and 43 of their brief have to do with operations which appear in the *preferred* embodiment in the original patent as well as in the reissue. It is well settled that a patentee is not limited to claiming the preferred embodiment. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 418, 52 L.Ed. 1122 (1908).

In items 5 and 6 on pages 43 and 44 of appellees' brief they say that roasting was included in all the process claims in the applications and in the original Proler patent. As pointed out in *In re Wesseler*, 367 F.2d 838 (C.C.P.A. 1966), and in *In re Handel*, 312 F.2d 943 (C.C.P.A. 1963), the Court should not look to the claims to determine the right to reissue. Both of those cases discuss the fact that if an argument such as that made by appellees were accepted, the whole purpose of the reissue statute would be defeated.

Finally, appellees allege that certain arguments made during the prosecution of the original patent, before roasting had been shown to be old, are evidence that roasting was essential. Appellees would have the court ignore the fact that the record clearly shows that the arguments which induced the Examiner to allow the original patent did not even mention roasting (R. 466-473), and therefore had no effect upon the issuance of the original patent.

Appellees' arguments attempting to discount the effect of appellant's evidence are replete with erroneous statements. For example, appellees state at pp. 45, 46 that in *Monogram Mfg. Co. v. Glemby*, 136 F.2d 961 (2nd Cir. 1943), the spring was originally described as optional. This is not true. The spring was described as

optional in a prior art patent (963, 964 of 136 F.2d), but not in the patent in suit. Appellees also say that the "objects of invention" of the Proler patent are not analogous to those of *Monogram* because Proler's objects are concerned with quality, costs and characteristics of the product. The objects in the patent in *Monogram* were concerned with efficiency, easy operation, easy cleaning, long service, simplicity and low cost (963 of 136 F.2d). It is hard to see how a closer analogy could be found. On the other hand, in *U. S. Chemicals* the court noted that the objects of the invention recited the use of water, which is what was omitted in the reissue.

Every fact cited in *Monogram* on the question whether the reissue was for the invention originally disclosed exists in this case. Conversely, the facts in this case are distinguishable from the facts in *U. S. Chemicals*.

The record in this case makes it clear that there exists a genuine issue of material fact on the question whether claim 9 is for the invention originally disclosed.

2. The Reissue Error.

All of appellees' arguments on the error questions derive from a single erroneous view of the law—the meaning of the term "error without deceptive intention" in 35 U.S.C. §251. They never say what they would have the term mean, but they deny that it includes a failure of the patentee to claim as broadly as he was entitled to, as appellant asserts, and as the courts have consistently held. Note the statements of four different Courts of Appeals at pp. 69-70 of appellant's original brief. To counter this, appellees cite only *Lockwood v. Langendorf United Bakeries, Inc.*, 324 F.2d 82 (9th Cir. 1963), in which the term "error" is not defined at all, and the court expressly stated that it would not pass

on the question of whether there was error. The other cases cited give no meaning to the term different from that set forth by appellant. In fact, *Miller v. Brass Co.*, 104 U.S. 350, 26 L.Ed. 783 (1881), cited by appellees, expressly states that a failure to claim broadly enough to cover the invention is ground for a reissue.

The record contains ample evidence that the applicant Proler failed to claim as broadly as he was entitled in his original patent. Roasting was old (Brooke patent, Ex. U), and was not a factor in the allowance of the original claims, so the prior art would have permitted broader claims. No claims of the scope of the reissue claims had ever been prosecuted and abandoned. *National Nut Co. v. Sontag Chain Stores Co.*, 107 F.2d 318, 331 (9th Cir. 1939). The roasting limitation was not added to avoid the prior art. *In re Wesseler*, supra at 849.

At the very least a genuine issue of material fact is presented as to whether there was error as contemplated by the statute, and more particularly, whether the applicant Proler failed to claim as broadly as he was entitled in his original patent.

The only evidence on which appellees rely to support their view that this fact issue should be found in their favor are the arguments made by Proler's attorney during the prosecution of the applications and the fact that all the original claims included roasting. Appellees cite no authority holding that any such evidence is material to a determination of this fact issue. And the law is clear that it is not material. As stated by the court in *In re Wesseler*:

“ . . . in the literal sense . . . every paper formally submitted is generally done ‘deliberately’ and with the design of advancing the prosecution so as to secure a patent. As discussed infra, that is not what

is meant by the term 'deliberate.'" *In re Wesseler*, supra at 848.

The court further stated: "We find that while appellant acted 'deliberately' he did so in error." *In re Wesseler*, supra at 850.

Appellant has already pointed out in its original brief at p. 74, that the law does not require a reissue oath at all. Even the case cited by appellees, *General Radio Co. v. Allen B. DuMont Laboratories*, 129 F.2d 608, 612 (3rd Cir., 1942), acknowledges that the Commissioner of Patents may use other evidence.

However, assuming *arguendo* that the law did require that the oath fully set out the nature of the error relied on for the reissue, Sam Proler's oath (R. 495, 496) fully complied, as is noted at pp. 72, 73 of appellant's original brief. In any event, the question of whether or not the oath set out the nature of the error would certainly be a fact question, and therefore not determinable on summary judgment.

Thus, in granting summary judgment on the questions of error as a basis for the reissue, the district court necessarily decided at least the following genuine issues of material fact:

1) Whether it was error without deceptive intention for Sam Proler to fail to claim his invention more broadly in his original patent.

2) Whether the oath describes the error; and

3) Whether without the oath, the Commissioner had sufficient evidence before him to find error.

III.

CONCLUSION

Appellees' position that there are no fact issues in this case is certainly inconsistent with their contention before

Pretrial, when they advanced 94 issues of fact, which, after several days of conference between counsel, culminated in the 34 fact issues set forth in the Pretrial Conference Order (R. 209-213).

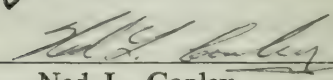
The record before this court discloses that genuine issues of material fact exist on each of the five grounds on which summary judgment was granted. The district court therefore erred, and its judgment should be reversed and remanded so that appellant may have its day in court.

Respectfully submitted,

BUTLER, BINION, RICE, COOK
& KNAPP

By

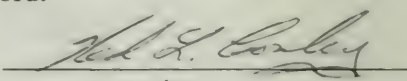

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

This is to certify that three copies of this brief have been served on counsel for the appellees by mailing them to their addresses of record.


Attorney

APPENDIX

Statutes

35 U.S.C. §112

§112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

* * * * *

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. §251

§251. Reissue of defective patents

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

In The
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

GYRO ENGINEERING CORPORATION

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee,

REPLY BRIEF FOR THE APPELANT

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FILED

AUG 14 1968

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Appellee.

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DISAGREEMENT WITH APPELLEE'S STATEMENT OF
THE OPINION BELOW

In its opening brief Gyro stated, under the designation "Opinion", that:

"The District Court wrote no opinion. Rather it signed and entered the Findings of Fact and Conclusions of Law submitted by the government. (706-753)."

Nevertheless, the government's reply brief claims, under the designation "Opinion", that:

"The opinion of the District Court (II-R. 706-750) is officially reported at 276 F. Supp. 454 (C.D. Calif. 1967)."

However, a reading of 276 F. Supp. 454 shows, on its face, that

the District Court did not write an opinion, but merely signed and entered the Findings of Fact and Conclusions of Law submitted to it by the government. (Compare II-R. 706-750 with 276 F. Supp. 454).

AGREEMENT WITH APPELLEE'S STATEMENT OF JURISDICTION

Gyro agrees with the government's statement of jurisdiction.

DISAGREEMENT WITH APPELLEE'S STATEMENT OF QUESTION PRESENTED

The government's statement of the Question Presented ignores virtually all of the 53 Specifications of Error Relied On, and would, if accepted as a proper statement thereof, result in Gyro being deprived of rulings on the errors assigned by it. The issue on appeal here is not whether "the record warrants the District Court's conclusion" that there was no bona fide sale, but whether certain fundamental findings of fact upon which the conclusions of law are based were clearly erroneous, whether certain findings of fact prerequisite to the conclusions of law were even made, and whether the conclusions of law which were made misinterpret and misapply the law. The government's effort to avoid those questions and the 53 specifications of error related to them by its trial de novo brief directed to the generalization of whether the record warrants the conclusion of no bona fide sale begs virtually every issue raised on appeal, and raises the serious question of why the government was unable to respond to

those questions.

DISAGREEMENT WITH APPELLEE'S STATEMENT
OF THE STATUTES INVOLVED

In addition to the statutes set forth by appellee, Section I239 should be added for the reasons set forth in Part I of Gyro's opening brief.

DISAGREEMENT WITH APPELLEE'S STATEMENT
OF THE CASE

The government's statement of the case, conceded by it in the first sentence thereof to be a summary, is subject to serious criticism because it avoids those facts stipulated by the parties and adduced at the trial which are unfavorable to its view of the case, because many of its statements of fact are actually contradicted by the stipulations of fact and the other evidence, because many of the record citations in "support" of its "fact" statements are the very findings of fact which Gyro has previously shown are clearly erroneous and to which the government has declined to respond, and because many of its statements support only the conclusion that Gyro was in reality the Mowrys whereas the critical conclusion of law was that Gyro owed the deficiencies in tax and hence did exist for tax purposes.

As an example of the former (omissions of fact), there is the failure of the government to set forth the several activities of Gyro from April 1953 to 1959 other than its gyroscopic activities, followed by its statement that Gyro was moribund, which then served as the "support" for the conclusion that the

January 1, 1959 purchase revived the corporation.

Illustrative of the statements supporting a conclusion that there was no corporation for tax purposes but only Chris and Natalie Mowry whereas the key conclusion herein was that Gyro owed the disputed deficiencies rather than any other taxpayer are those statements claiming that Gyro had no telephone, that the only bank account was that of Chris and Natalie Mowry, that Gyro filed no federal withholding tax returns, that payroll checks were issued in the name of Chris and Natalie Mowry, that no books were offered in evidence, that Chris and Natalie Mowry retained control over the real property sold, and that Chris Mowry dealt with the assets as he did with his own assets and business, "and paid little heed to the amenities of doing business through the corporation form." (See pages 4-6 of Appellee's Brief).

With respect to those statements by the government which are contradicted by the stipulations and other evidence, the following are examples thereof:

(1) "All money 'paid in' for the stock issued by the taxpayer and representing the paid-in 'capital' of taxpayer from the time of its incorporation throughout the years in suit was simply money deposited in the personal bank account of Chris and Natalie Mowry." (Appellee's Brief at 4). Yet Stipulation of Fact No I states that "Chris and Natalie Mowry paid \$2,500 for the shares issued April 20, 1953," and "Twenty-five hundred dollars was also paid for the shares transferred from Chris Mowry to William Mowry on April 20, 1953." (R. I-48 at lines 15 through 19). Since the 5,000 shares could hardly be "paid" for if the

money was simply paid to Chris and Natalie Mowry, the above statement of fact by appellee is contradicted by the stipulation of facts it signed.

(2) "Any actual cash representing the paid-in 'capital' of taxpayer was supplied by Chris and Natalie Mowry." (Appellee's Brief at 4). However, Stipulation of Facts No I states that "William Mowry actually supplied the consideration for 25% of the stock interest in Gyro in that manner." (R. I-49 at lines 9 through 12). Thus, the government's statement of "fact" is either directly contradicted by the stipulation of facts it signed or is so misleading as to be a contradiction thereof.

(3) "With the exception of this purchase (the Paloma Street property), taxpayer was, on the whole, inactive between 1953 and 1959." (Appellee's Brief at 5). But the uncontradicted testimony of Chris Mowry is that during that period a number of different real estate developments were investigated, scientific research on long range weather forecasting and how the eye sees color and on the unified field theory was done, and patent applications were filed. (Tr. II-239-240).

(4) "There is no evidence that the taxpayer kept any books." (Appellee's Brief at 5). However, the President of Gyro testified, without later impeachment, as follows:

"Q. Does Gyro Engineering maintain its own books and records?

A. Yes.

Q. For how long?

* * *

A. Well, from the beginning, from 1952." (Tr.

II-24I).

Obviously it is false to say "there is no evidence that the taxpayer kept any books."

(5) "Taxpayer entered into what purported to be a written 'sales and purchase agreement' with Chris and Natalie Mowry by which it purported to buy from them three parcels of improved real property consisting of apartment buildings and the land on which they are situated known as The Tropics, The Carousel, and The Orange Grove Circle Apartments." (Appellee's Brief at 5). Yet in Stipulation of Facts No I, the government stipulated that:

"Gyro Engineering Corporation purchased from Chris and Natalie Mowry three (3) parcels of improved real property known and referred to respectively as (1) "The Tropics", (2) "The Carousel", and (3) "The Orange Grove Circle Apartments"." (R. I-50).

Thus, the stipulation contradicts the government's above statement of "fact".

(6) "The total 'sale price' was purported to be \$3,164,000." (Appellee's Brief at 6). But Stipulation of Facts No I states that:

"The total purchase price was allocated by Gyro Engineering Corporation as follows."

(Underscoring supplied). (R. I-51, 53, 54).

There is nothing "purported" about the purchase price in the

stipulation of facts.

(7) "No evidence was introduced to show that the taxpayer was held out to third parties as the owner of the land or apartment buildings after the transfer and through the years in suit." (Appellee's Brief at 6). However, the President of Gyro testified that Gyro made all the payments on the mortgages assumed by Gyro on January 1, 1959 on the apartments. (Tr. II-248, Tr. III-439). Therefore, Gyro certainly held out to the owner of the mortgages (Massachusetts Mutual and Travelers, third parties) that it was the owner of the apartments. Also, the Commissioner of Internal Revenue asserted deficiencies in income tax against Gyro based on income derived from said apartments as shown in federal income tax returns filed by Gyro. Thus, Gyro held out to the Commissioner (a third party) that it owned the apartments, and the Commissioner agreed with Gyro in this case that it did.

(8) "Monies 'paid' to the transferors as 'sellers' of the apartments were not withdrawn but were simply represented by funds already in their personal account, which account was also used by the taxpayer." (Appellee's Brief at 8). However, Stipulation of Facts No. Two states that:

"Payment of principal were to be made at the rate of \$60,000.00 per year. ... The said \$60,000 annual payments were made through 1963 or a total of \$300,000.00."
(R. I-87).

Thus, the annual payments on the purchase price were paid.

(9) "At least some of the checks in evidence were clearly for personal expenses of the Mowrys." (Appellee's Brief at 9). If so, how could the District Court have allowed, as it did, the total of such expenses and checks as proper deductions from Gyro's gross income? The government's statement actually contradicts the trial court's ruling.

(10) Chris Mowry testified, with reservation, that he would be agreeable to "subordination". (Appellee's Brief at 10). Actually Chris Mowry testified that there was about \$2,000,000 still due to him and Natalie Mowry on the \$3,164,000 sale price, and that Gyro had recently obtained mortgage loan commitments on the apartments of \$1,800,000, after which the trial judge asked if in his negotiations on such loan commitments he and Natalie Mowry would be required to subordinate their \$2,000,000 indebtedness and whether this would be agreeable to him. (Tr. III-344-345). The full answer was:

"Provided that we got paid the proceeds

of the loan. Otherwise, no." (Tr. III-345).

That is, the government's phrase "with reservation" actually means that Chris Mowry testified that he would not subordinate the \$2,000,000 indebtedness to him unless he and Natalie Mowry received \$1,800,000. (Tr. III-345-346).

(II) "The ratio of debt to equity at the time of the transfer was 316.4 to 1." (Appellee's Brief at 10). However, since Gyro knew in 1958, prior to the January 1, 1958 acquisition of the apartments, that it was going to receive a net of \$30,000 from the condemnation award on the Paloma

Street property (Tr. III-423-425), and had in addition a \$10,000 capital stock account, it had a capital structure of \$10,000 plus the \$23,096.65 gain from the condemnation award or \$33,096.65. The debt to equity rate was therefore \$3,164,000 to \$33,096.65 or 90 to 1 rather than 316.4 to 1.

(I2) In deficiency notices for the years involved, the Commissioner of Internal Revenue determined that Gyro must use Chris and Natalie Mowry's cost basis in the apartments "on the ground that in substance and for federal income tax purposes, the transfer was not a bona fide sale, but rather was a contribution to taxpayer's capital." (Appellee's Brief at I2). Actually, the author of the deficiency notices, Mr. John W. Nisbet, stated categorically that "the statutory notices do not mention the theory of law" (Tr. II-I68-I69), and that any written reference to the basis of the deficiency was in an office statement which is never shown to or mailed to taxpayers and was not presented to Gyro. (Tr. II-2II, 2I6). All the court needs to do to satisfy itself that this statement of "fact" by the government is as false as the others reviewed above is to read the deficiency notice which is totally devoid of any ground in support of the deficiencies asserted. (R. I-I7-2I).

(I3) The District Court "found" that "the recited 'price' for the transferred buildings was excessive in relation to their fair market value." (Appellee's Brief at I2). The fact is that the District Court made no such finding, and if it had, it would have been clearly erroneous. The subject finding

of fact (No. 47) stated that:

"Both plaintiff and defendant presented expert evidence on the fair market value of the properties at the time of the transfer. While this evidence is in part conflicting, after careful consideration the Court is inclined to the view that the recited 'price' was somewhat excessive in relation to fair market value." (R. II-726).

This does not find as fact that the price was excessive as the government states. It simply finds that the trial court is "inclined to the view" that the price was "somewhat" excessive. How much is somewhat? One dollar? And for the reasons set forth at pages 40 and 41 of Gyro's opening brief here, if such a finding had been made, it would be clearly erroneous.

ARGUMENT

Before responding to the specific contentions found in the government's brief, there are certain general infirmities to its arguments which render them of no merit.

First, it is necessary to note that Gyro's opening brief asks reversal on the grounds that: (1) at least 35 of the findings of fact, upon which crucial conclusions of law were based, are clearly erroneous; (2) certain findings of fact, which are prerequisite to some of the critical conclusions of law, were never made; and (3) many of the controlling conclusions of law misinterpret and misapply the applicable law. To

(1) and (2) above the government has responded with silence or a citation to the challenged finding itself as "authority" followed by a trial de novo type argument in which the same arguments made to the trial court have simply been reiterated here. Thus, nearly two-thirds of the government's brief is a statement, restatement, and reiteration of its restatement, of its version of the "relevant" facts. To (3) above, it set forth its version of the law.

Second, the case the government is arguing on appeal here is neither the case which was decided by the trial court nor the one appealed to this court. Thus, the trial court's ruling below, after the filing of briefs, was that:

"The transfer from the Mowrys to Gyro of the apartment houses was a sham, without substance, and therefore for income tax purposes was merely a contribution to the capital of Gyro." (R. 643)

That is, the trial court ruled the transfer was a sham. However, here the government, for obvious reasons, does not want to defend that ruling, and is attempting to defend the different proposition that "the purported sale in substance constituted a contribution to taxpayer's capital."^I In short, the government is trying to convert this appeal into a "substance over form" case whereas the trial court actually found that the transfer was a sham and "therefore" a contribution to capital. Why

^I See page 18 of Appellee's Brief.

does the government do this? Because if the transfer was a sham, which the trial court ruled it was, there was no transfer for federal tax purposes, and the income from the apartments must remain the income of Chris and Natalie Mowry rather than income of Gyro's. To try and avoid this error, the government now pretends that the trial court did not rule that the transfer was a sham and therefore a contribution to capital. It does not wish to explain how a transfer could be a sham and yet still be a transfer resulting in a capital contribution.

Third, the government has made no attempt to answer Points V, VI, VII, XI, and XII of Gyro's opening brief.

Fourth, under the very criteria cited by it, the government cannot prevail because the findings of fact in support of the application thereof are clearly erroneous.

A.

The Government Has Failed To Respond
To The Contentions Made By Gyro

As shown below the government has not responded to the contentions made by Gyro in its opening brief.

I.

Gyro's first contention, at pages I3 through 23, was that Commissioner v. Brown, 380 U. S. 563, 578-579 (1965), held that when Congress has considered the practice of selling depreciable assets to controlled corporations, and has responded with the precise provision of narrow application set forth in Section I239 which did not deny the fact or occurrence of a

sale, the Commissioner cannot, via the strategem of contending there was no sale, invade the policy of Congress and therefore fashion a broader rule. The government's complete "answer" to such argument is set forth in footnote 4 at page 18 of its brief wherein it states that to assume there was a sale here "is to beg the very point at issue" which it says is whether there was a sale. In short, the government has begged the very issue raised by Gyro by claiming that Gyro has begged the issue here.

The point which the government has decided not to answer is that Commissioner v. Brown, supra, held that the word "sale", as used in the Internal Revenue Code, unlike the creatures of tax law known as "capital gain" and "capital asset", is to be given its common and ordinary meaning by the courts, and where the Congress has dealt with a specific problem and responded with a provision of precise application (I239), which does not deny the fact of a sale, then the Commissioner is not empowered to broaden that rule by challenging the existence of a "sale" by giving the word a special interpretation for federal tax purposes. That the government has done precisely that is shown by its repeated arguments to the District Court that the issue here is whether this was "a sale within the terms of The Internal Revenue Code - not whether this is a sale otherwise." (Tr. V-715).

2.

Point II of Gyro's opening brief, at pages 23 through 29, was the government stipulated that Gyro purchased the apartments,

and it was clearly erroneous of the trial court to find that it did not. The government's entire "answer" thereto is set forth in footnote 5 at page 19 of its brief. There is found the self-serving conclusion that the word purchase was employed "to indicate only what the parties purported to do." But where is the language in the stipulation or the pretrial order so limiting the stipulation, and what would be the point of such a stipulation? Also, the government tenders the thought that if the word purchase in the stipulation is to be distorted and stretched to mean just what it says - purchased -, then that would be to attribute to the government a concession of the issue of whether there was a sale. That is, the government is saying that the Court cannot apply the words used in a stipulation if the effect is to cause the government to lose. This is an interesting notion, but hardly a tenable one. Furthermore, it is grossly misleading for the government to suggest that it could not have intended, assuming its post trial intention is relevant, to stipulate there had been a sale. Why? The reason is that the government's sudden discovery of the "sale" issue did not occur until long after it had signed the said stipulation. What happened was the following.

The 30-Day letter issued to Gyro for the years involved asserted a deficiency of only \$5,774.16, and adopted a theory allocating all of Gyro's income and expenses to Chris and Natalie Mowry. (R. I-9, I2). Thereafter, Mr. John W. Nisbet, a Texas public accountant employed by the Appellate Division of the Internal Revenue Service, devoted 91 hours to the reading



of every tax case he could find and generally doing research on the case and the law after which he wrote the statutory deficiency notice to Gyro for about \$100,000 which notice he conceded contains no explanation whatever of the government's theory or position. (Tr. II-161, 201-202, 169-172). Later on October 15, 1965, after the complaint herein was filed, Mr. Nisbet's deposition was taken and he was asked by plaintiff if the disallowance was based on the theory that the transfer to Gyro was a nontaxable exchange (Section 351) ? Upon instruction from the government's trial counsel below, Mr. Nisbet then answered: "Yes, nontaxable exchange." (R. I-134).

It was after Mr. Nisbet had testified at his deposition that the transfer was a nontaxable exchange that the government's trial counsel then stipulated in Stipulation of Facts No. I that Gyro purchased the apartments. Said counsel filed the said stipulation on May 11, 1966. (R. I-46). At that point the government's "sleeping dog" (there was no sale but a contribution to capital under Section 362 (a) (2)) had never been mentioned to Gyro's counsel by the government's trial counsel, nor had any written notice, formal or informal, ever been issued to Gyro stating that it was not claiming there had been a nontaxable exchange under Section 351 but instead or in the alternative that there had been no sale but a contribution to capital under Section 362(a) (2). Therefore, for the government to state or imply that the word purchase in the May 11, 1966 stipulation should not be given the meaning purchase because the government would then be deemed as having

stipulated away its case on May II, 1966 is grossly misleading.

3.

The government made no response to Gyro's point that since the government stipulated that Gyro purchased the apartments, the trial court erred in finding that Gyro purchased the apartments (Finding of Fact No. 2) and then concluded that it did not.

4.

Gyro's fourth point was that Commissioner v. Brown, 380 U. S. 563(1965) defined the word "sale" as used in the Internal Revenue Code to be simply a "transfer of property for a fixed price in money or its equivalent," and that the record and the government's own concessions show that such a transfer occurred here. Thus, the trial court erred in ruling there was no sale. The government's full "answer" therero is in one sentence of page 31 of its brief and footnote 13 at said page.

Its answer is that Brown presented a different issue, and that the facts there were different. However, as emphasized at pages 30 and 33 through 36 of Gyro's opening brief, assuming arguendo there was a valid distinction on the facts, the Supreme Court's definition of the word "sale" as used in the Internal Revenue Code cannot be dismissed. The case was not an ad hoc decision, but was taken by the Supreme Court because the Commissioner told it that it was one of the most important tax cases ever to come to the Supreme Court, and that the latter should tell the lower courts what the word "sale" means because there was no core of agreement in the lower courts.

The Supreme Court then gave its definition which the Commissioner obviously does not like, and hopes to avoid by telling the lower federal courts that Commissioner v. Brown is limited to its facts - a patently erroneous statement.

5.

Gyro's fifth point was that both the Commissioner and the Supreme Court in Commissioner v. Brown, supra, recognized that once the Commissioner concedes there was a sale under local sale, as he did here, he has of necessity abandoned his argument that the transaction was sham. The government failed to respond to this point.

6.

The sixth point advanced by Gyro was that the trial court erred in ruling that the transfer from the Mowrys was a sham, and then ruling that there was a transfer which was a contribution to Gyro's capital. Again the government has been unable to answer the contention, and has instead stated, at page I8 of its brief, that the sale "in substance constituted a contribution to taxpayer's capital." But that is not what the trial court's basic ruling of March 22, 1967 said. It ruled that "the transfer from the Mowrys to Gyro of the apartment houses was a sham, without substance, and therefore for income tax purposes was merely a contribution to the capital of Gyro." (R. II-634). What the government has done is misstate the first part of the trial court's ruling, and then focus the attention on only the second half thereof. There are two sides to the coin. The one is that the transfer did not occur (transfer

a sham, without substance), and the other is that "therefore" there was a contribution to capital. And it is the second side that is a non-sequitor. It cannot follow from the ruling that there was no transfer (transfer a sham) that "therefore" there was a transfer which resulted in a contribution to Gyro's capital. And that is why the government is pretending that the trial court did not rule that the transfer was a sham by urging that the question here is whether under the doctrine that substance governs over form the transfer was a sale or a contribution to capital. That is, after citing the trial court to numerous facts showing that Chris and Natalie Mowry were still the owners of the income from the apartments and then asking the trial court to conclude that the transfer was a sham, the government now wishes to pretend that that is not what the trial court did.

7.

Gyro's seventh point, and a vital one, is that the trial court made no finding that Chris and Natalie Mowry, the owners of 55% of Gyro's capital stock, intended to make a contribution to Gyro's capital of \$2,372,361.50 which was their equity in the apartments. The government has submitted no answer at all to such contention.

8.

The eight point made by Gyro was that when the Commissioner departs from the grounds relied on in his notice of deficiency to sustain a theory later raised, he has the burden of proving any new matter raised, and hence, where as

here, he has not done so, the taxpayer prevails. The government's entire "answer" thereto is in footnote 7 at page 24 of its brief and at pages 23 and 24 in the text.

One half of the government's response, in footnote 7, is the patently erroneous statement that "the cases on which the taxpayer relies involved deficiency redetermination proceedings in the Tax Court, where the question is whether the Commissioner's deficiency notice is correct, and not refund suits in the District Court, where the taxpayer must prove that the Government owes him money." Since the only two cases cited by Gyro as authority for its contention are District Court cases (one from Arizona and the other from Nebraska), it is virtually inconceivable that the government would submit to the Court such a misstatement. In any event, its "distinction" is non-existent.

The other half of the government's attempt to by-pass the rule that it has the burden in a refund suit of proving any new matter raised when it departs from the grounds relied on in the Commissioner's deficiency notice is the statement that the taxpayer must prove not only that the Commissioner's determination was wrong, but also establish the exact amount of the tax allegedly overpaid. The implication or unspoken inference of this statement is that in order to establish the exact amount of tax, the taxpayer's burden includes overcoming every conceivable theory which the Commissioner may raise, before or after the trial, including those not set forth in the deficiency notice whether or not

the government has proved new matters which it raised after departing from its deficiency notice. In short, the government is saying that, after the deficiency notice was issued here, it could adopt the theories that: (1) the transfer was a sham, or (2) in substance there was not a sale but a contribution to capital, or (3) the transfer was a nontaxable exchange under Section 351, or (4) the corporate income should be allocated to Chris and Natalie Mowry, or (5) Chris and Natalie Mowry were the same as Gyro and therefore Gyro paid none of the expense deductions claimed, and that the government has no burden whatsoever to prove the new matters raised because the taxpayer must show the exact amount of tax paid and he cannot do this until he has carried the burden of proving new matters respecting all of the government's theories. Surely to state the government's contention is to refute it.

9.

Gyro's ninth point was: the government's contention that there was no sale but a contribution to Gyro's capital is barred by the statute of limitations provided for in Section 6501 (a). Hammond v. Maloney, 80 F. Supp. 212, 217 (D. C. Ore. 1948), aff'd 9 Cir., 1949, 176 F. 2d 780. This case is not novel. A rule that an amount refundable can not be applied against a tax which is not collectible, either by assessment or suit, due to the running of the statute of limitations, has been applied by the Commissioner since 1921. I-1 CB 313. Nevertheless, the government contends that three cases sustain the proposition that the government may raise any new defense

at the trial even if the statute of limitations has run on making an additional assessment for that year.

The government's first case, Lewis v. Reynolds, 284 U. S. 281(1932) was decided 17 years before this Court affirmed Hammond v. Maloney, 80 F. Supp. 212, 217, and therefore it must be concluded that this Court did not so interpret Lewis v. Reynolds, supra, since it certainly would not have affirmed a District Court decision contra to a decision of the Supreme Court of the United States. And since the other two cases cited by the government are decisions of the Eight Circuit (United States v. Pfister, 8 Cir., 1953, 205 F. 2d 538 and Blansett v. United States, 8 Cir., 1960, 283 F. 2d 474), there is no need to examine them in view of this Court's affirmance of Hammond v. Maloney, 9 Cir., 1949, 176 F. 2d 780.

IO.

Gyro's tenth point was that there are 35 findings of fact upon which the conclusions of law rest which are clearly erroneous. The government has not answered these arguments. Instead it has recited its own version of the facts in which it misstates many crucial facts, omits facts bearing on critical findings, and cites the very findings of fact of the trial court which were challenged as clearly erroneous as its "authority" therefore.

II.

The eleventh point advanced by Gyro was that the trial court misinterpreted and misapplied the applicable law even if it were assumed that Commissioner v. Brown, supra, were

not applicable. The government's response and Gyro's reply thereto is set forth in Point I3 hereinafter.

I2.

As its twelfth point, Gyro pointed out that the only case cited by the government as interpreting Section 362 (a) (2) as it requested was Murphy Logging Co. v. United States, 239 F. Supp. 794, which was later reversed by this Court in 1967 at 387 F. 2d 222. The government has not replied to this point.

I3.

Gyro's last point was that there was a sale and purchase of the apartments, and therefore it did purchase property within the meaning of Section I033. The government's answer is that there was no sale, and its response is erroneous for all of the reasons heretofore and hereinafter set forth by Gyro showing there was a purchase.

B.

Assuming Arguendo That The Definition Of
Sale Set Forth In Commissioner v. Brown,
380 U.S. 563 (1965), Were Not Controlling,
The Criteria Applied By The Trial Court
Is The Result Of Misinterpretation Of The
Law And Is Based On Clearly Erroneous
Findings Of Fact.

In Point XI of its opening brief Gyro showed that assuming the definition of "sale" in Commissioner v. Brown,

supra, was not controlling, there was still not a single case cited by the government or the trial court which dealt with the specific issue raised by the government - was there a sale or a contribution to capital within the meaning of Section 362(a)(2). It pointed out that the government's cases were concerned with whether there was a capital investment (not the same as a contribution or donation to capital) or a sale, and that it had "extracted" those certain criteria from diverse cases involving different issues without applying all of the criteria set forth in each case.

The government's first "answer" is to say that "no one factor is conclusive." Gyro agrees but what of it? The unspoken inference is that since no one factor is controlling, the trial court is given license to select from diverse cases dealing with different issues or only half of the question presented (was there a sale or -) any criteria it chooses, ignore the others set forth in the case, and compile a list of criteria which determine nothing. Its second answer is to argue that the issue here is basically factual, and therefore any old criteria will do the trick no matter how obtained. However, if the issue is basically factual, then why the inordinate amount of legal "authority" in the findings submitted by the government. Also, if whether a transfer is in substance a sale is merely a fact issue, why did the government take that very same issue to the Supreme Court so that it could tell the lower court what criteria were to be applied in determining what was in substance a sale? Surely,

it is obvious that when the government, at this stage of the case, claims the issue of whether there was in substance a sale is a factual issue and therefore misapplying the case law criteria really does not matter, it is admitting that it mislead the trial court.

But the criteria it sets forth at page 20, dicta from O.H. Kruse Grain & Milling Co. v. Commissioner, 9 Cir., 1960, 279 F. 2d 123, is, on its face, not applicable. As the government states, the factors listed determine "whether amounts advanced to a corporation constitute equity capital (not a contribution or donation to capital) or indebtedness (not a sale)." For example, one of the factors mentioned is payment of interest out of dividends only, clearly inapplicable here.

Nevertheless, assuming arguendo that the eleven criteria set forth as dicta in O. H. Kruse Grain & Milling Co. v. Commissioner, supra, were not those used, as Judge Barnes said, in determining whether amounts advanced to a corporation constitute equity capital or indebtedness but those used to determine whether there had been a sale or a contribution to capital within the meaning of Section 362(a)(2), the findings of fact would be clearly erroneous if they did not support a conclusion that there had been a sale. Why? For the following reasons:

(1) Criterion No. (1) is entitled "the names given to the certificates evidencing the indebtedness." Here it was stipulated by the government that Gyro issued and delivered to Chris Mowry on January 1, 1959 three "promissory notes

dated January 1, 1959, one of which was in the face amount of \$1,970,829.65, another in the face amount of \$170,363.35 and the third in the face amount of \$201,168.50." (R. I-50).

(2) Criterion No. (2) is designated "the presence or absence of a maturity date." Here the \$1,970,829.65 promissory note calls for semi-annual payments of \$20,000 each on June 1st and January 1st (R. I-73), while the other two notes call for \$5,000 semi-annual payments on June 1st and January 1st (R. I-74, 75). Thus, and as the trial court found as fact, the notes had a maturity date of 39.03 years. (R. II-715, Finding of Fact No. 24).

(3) The third criterion is "the source of the payments." The government implies this is a ban against payments of the purchase price from income earned by the asset sold despite the express rejection thereof. Commissioner v. Brown, 380 U.S. 563, 570. However, O.H. Kruse, supra, must be read in the light of the more recent holding in Commissioner v. Brown, supra, and therefore "the source of the payments" must be interpreted to cover the case where seller is to receive his payments only out of profits as would be the case with a dividend. Here the fact is that \$300,000 annual payments were made from 1959 through 1963 even though the returns for 1959 and 1960 show there was no profit. (R. I-87, 65, 70).

(4) The right to enforce the payment of principal and interest is the fourth criterion. Both the Sale and Purchase Agreement (Exhibit 4 to Stip. No. 1) and the Trust

Agreement incorporated by reference therein(Exhibit 10) allow sellers to foreclose upon default or operate the property.

(5) The fifth criterion is "participation in management." Here Chris Mowry participated in management, and this is the first criterion of the two referred to in O. H. Kruse, supra, which is presented here by the Commissioner.

(6) The sixth criterion is "a status equal to or inferior to that of regular corporate creditors." Here the terms of the trust agreement incorporated into the Sales and Purchase Agreement provide that upon default the sellers may declare all sums due and payable, the property may be seized, and then operated or sold, and in general foreclosure effected. (Exhibit 10). Also, the terms of the Sales and Purchase Agreement provide that the purchaser execute and deliver an assignment of rents and management on each property to secure the payment of each note if there is a default or the buyer becomes insolvent. (R. I-72). Thus, the sellers were neither equal to nor inferior to regular corporate creditors. And for the reasons set forth at page 62 and 63 of Gyro's opening brief, there was no subordination in fact.

(7) The seventh criterion is "the intent of the parties." Here Chris Mowry's testimony on intent was that neither he nor Natalie Mowry had any intention of making a gift or donation or contribution to capital of Gyro of their equity in the apartments sold. (Tr. III-335-336, 349-350).

(8) The eight criterion mentioned in O. H. Kruse, supra, is a "thin or adequate capitalization." Here the ratio

of debt to equity is 90 to 1 as shown at page 63 of Gyro's opening brief. Hence, if the Court deems this a "thin capitalization" and a relevant factor despite the rejection thereof by implication in Commissioner v. Brown, supra, (a purchase price of \$1,300,000 and a capitalization of \$25,000 or 52 to 1), this is the second of the two criterion applicable out of eleven.

(9) The ninth criterion listed was "identity of interest between creditor and stockholder." In O. H. Kruse, supra, the Court mentioned that 100% of the taxpayer's stock was owned by the creditor thereby reflecting identity of interest. But here Chris and Natalie Mowry owned only 55% of Gyro's stock, and hence there was no "identity" of interest.

(10) The tenth criterion mentioned in O. H. Kruse, supra, was "the payment of interest only out of 'dividend money'." Here the annual payments of \$60,000 were made even though Gyro had no profit in 1959 and 1960. (R. I-65, 70).

(11) Finally, the eleventh criterion was "the ability of the corporation to obtain loans from outside lending institutions." Here, the record shows that Gyro obtained loan commitments of \$1,800,000 on the purchased properties. (Tr. III-345).

Since only two of the eleven criteria referred to in O. H. Kruse, supra, apply here, what other criteria does the government seek to apply, regardless of its source, which is based on a clearly erroneous finding of fact?

One is the claim that Gyro was "essentially" moribund

and was revived by the purchase. (Appellee's Brief at 25).

The evidence is contra since from 1953 to January 1, 1959, Gyro investigated the acquisition of several parcels of real estate, did work on long range weather forecasting, how the eye sees color, and the unified field theory, as a result of which Gyro now makes accurate long range weather forecasts and has a patent pending covering three dimensional color television. (Tr. II-239-240).

Another of the government's criteria is the statement that the seller failed to press for payment on the notes after default. (Appellee's Brief at 27). This is really a remarkable argument because it amounts to a contention that the validity of the government's assessments here should be sustained because Gyro paid the assessments made. Why? Because the returns in evidence (R. I-65, 70) show that Gyro's disposable cash, before claiming a depreciation deduction based on the January 1, 1959 sale price, was an average of about \$118,000 annually. Out of that sum, Gyro paid the \$60,000 annual purchase price payments and the mortgage principal payments due the insurance companies, the total of which consumed the \$118,000. However, when the government claimed about \$52,000 annually as tax and interest for 1959 and 1960 by disallowing the sale price as the basis for depreciation, Gyro was required to pay the 1964 annual purchase price installment of \$60,000 as well as the 1965 annual purchase price installment of \$60,000 to the government. Thus, in 1964 it paid about \$104,000 for 1959 and 1960 taxes and interest

claimed and had to be prepared to pay an equal amount for 1961 and 1962 as well as for 1963 and 1964. After paying the principal on the first mortgage payments in 1964 and 1965 plus the claimed taxes, there was nothing left to pay the annual payments thereafter. Thus, the government says there was subordination because it was paid the taxes it claimed, and the validity thereof can be sustained because in point of fact it assessed and collected said taxes.

Also, the Court knows, if the government does not, that foreclosure by the Mowrys in 1964 would result in the acceleration of gain on their installment gain sale contract thereby causing over \$2,000,000 of capital gain to be realized and \$500,000 of tax to become due should the sale of 1959 be upheld. In addition, the government had taken an official position with Chris and Natalie Mowry that since there was a contribution to capital rather than a sale of the apartments, the \$300,000 paid to them on the purchase price is in reality the distribution of a dividend on which they must pay ordinary income tax rates.

The government's next criterion states that "there was no security behind these notes." (Appellee's Brief at 27). However, both the Sales and Purchase Agreement and the trust agreement terms incorporated therein flatly contradict such a claim.

Next, the government cites as a criterion that the audit of Gyro's returns "began early in 1961" after which it "obtained for the first time written appraisals for the fair

market value of the property" and "recorded the deed." (Appellee's Brief at 28-29). However, written appraisals were obtained in response to a request from a Revenue Agent, and it hardly seems equitable for the government to request such written appraisals and then claim that honoring that request constitutes an attempt "to dress up the transaction." (Tr. III-433). Also, the deed was recorded March 17, 1961, and therefore any implication that it was done after Chris Mowry received notice that the Commissioner was either auditing the 1959 and 1960 Gyro returns or claiming the transaction was a sham is wholly without support. In the first place, the 1959 Gyro return was only "assigned for audit by the Internal Revenue Service on January 27, 1961," and the 1960 Gyro return was not "assigned for audit until October 13, 1961." (R. I-92). The Revenue Agent who conducted the said audit testified that he wrote his report in 1962, and that his audit required three or four months. (Tr. II-138). Thus, since the Agent's audit was for both 1959 and 1960, it is clear that his audit was conducted in November and December of 1961 and in part of 1962, and it is clearly erroneous to state that Chris Mowry was dressing up the transaction after the audit began or was completed. The Revenue Agent's testimony conforms to Chris Mowry's testimony that the first time the I. R. S. talked with him was in the late Spring of 1961 (Tr. III-344).

Next, the governemnt states as a criterion that the transfer had little purpose other than to avoid taxes (Appellee's Brief at 29), and cites as its authority the very findings

of fact which Gyro has attacked in its brief as clearly erroneous.

More importantly, the government sets forth as another criterion that the taxpayer's own valuation expert, Mr. Vaughn, testified that the fair market value of the apartments was \$2,427,750 or 30% less than the \$3,164,000 January 1, 1959 sales price. Since a grossly excessive "sale price" is the factor which the Supreme Court relied on in Commissioner v. Brown, supra, to distinguish Kolkey v. Commissioner, 27 T.C. 37, aff'd 7 Cir. 1956, 254 F. 2d 51, the said inexcusable misstatement by the Commissioner, Gyro submits, is warrant for the conclusion that the government has no case at all. Why? Because Mr. Vaughn never testified that the fair market value was \$2,427,750 nor did the trial court so find. The court evaded this crucial issue by finding nothing when it said it was "inclined to the view that the recited 'price' was somewhat excessive in relation to fair market value." (R. II-726). Thus, the government has substituted its own "finding" for the one actually made by the trial court. And Mr. Vaughn testified explicitly that the fair market value of all the apartments on January 1, 1959 was \$2,985,000 or \$179,000 less than the \$3,164,000 sale price, (Plaintiff's Ex. 1, Tr. I-77, 86, 91), clearly within a reasonable range of the fair market value especially since his \$2,985,000 value was based on all cash being received by the sellers, (Tr. I-105-106). Commissioner v. Brown, supra. Mr. Vaughn testified very specifically that he "gave consideration" to the three conventional "approaches" to valuation, namely

the summation or cost approach, the comparable sales approach, and the capitalization of income approach, and stated that "I will not" arrive at an opinion as to the fair market value of the property until I consider all three approaches. (Tr. I-61, 71).

Furthermore, the government's own "expert" on valuation, an Internal Revenue Agent, testified that he himself would have bought the apartments for \$3,164,000 with \$30,000 down and annual payments of \$60,000 per year. (Tr. IV-601-602, 605). And the devastating effect of such testimony by the government's "expert" was acknowledged by the trial court which refused to admit summary of his valuation into evidence as he had with respect to Mr. Vaughn's testimony, and later ordered the summary struck from the government's brief as an exhibit. (Tr. I-93, V-603, R. II-542-543, 632). Worse yet for the government, the testimony of its "expert" was offered at the outset thereof for the following purpose:

"The main thrust of Mr. Halstead's testimony will be to the question of whether or not an investor would make this - a normal investor, assuming normal motives - would make this kind of a purchase. In other words, was this an economic purchase or on the other hand was it, as we contend, a sham transaction." (Underscoring supplied). (Tr. IV-542).²

That is, his testimony as to whether an investor would make the instant purchase was to be the government's evidence that the transaction was a sham, and yet that "expert" testified he would "as a hypothetical average investor" certainly "purchase" the apartments for \$3,164,000. (Tr. IV-604-605).

Furthermore, this case is not in this Court as a trial de novo for a finding of fact by a court of appeals as to what was the fair market value of the apartments. Findings of fact must be made by the trial court under Rule 52 after which the party affected has the opportunity to appeal on the ground that the finding of fact is clearly erroneous. The government is in effect asking the Court of Appeals to make a finding of fact - that the fair market value of the apartments was 30% less than \$3,164,000 - which the trial court would not make, and then asking that a judgement which is not founded on that new finding be affirmed.

Another criterion advanced by the government was that the down payment was only \$30,000 on a sales price of \$3,164,000. (Appellee's Brief at 30). However, Commissioner v. Brown, supra at 570, rejected the view that a low down payemnt supports a conclusion that in substance there was no

² It is significant to compare the above presentation of the sham transaction position to the trial court and its other statements to the trial court that its position was that the transfer was a sham (R. I-494, Tr. V-707, 709) with its abandonment in this Court of Appeals of such argument in footnote 12 at page 29 of its brief stating that "The government's position is not that the transfer was a sham" but that "the 'sale' label attached to the transaction by the parties is not determinative of its substance and tax effect."

sale.

Also, the government urges that a criterion is the fact that the transferors were not discharged from their obligations on the first mortgages. (Appellee's Brief at 30). Gyro's counsel cannot recall any instance in which an insurance company holding a mortgage has ever released the sellers upon a sale. If that is the test of a "sale", then there are very few sales of real estate in this country.

Next, the governemnt sets forth the criterion that "the transaction did not take place at arm's length, but was between a corporation and its controlling shareholders." (Appellee's Brief at 30). But if that is the test of an arm's length transaction, rather than whether the purchase price was within a reasonable range of the fair market value, then there can never be a "sale" of depreciable property under Section 1239 between shareholders owning over 50.1% of the stock and the corporation despite the provision in Section 1239 that capital gain will be denied only if the controlling shareholders own 80% or more of the stock. That this argument, that an arm's length transaction cannot exist when there is a transfer between shareholders owning 50.1% and their corporation is the key to the trial court's holding is seen by the following at the close of the trial:

"Mr. Jones: Well, I think that if it were an arm's length transaction. -

The Court: That is the key to the whole thing, what is an arm's length transaction?

Is it a transaction whose motivating purpose is the avoidance of taxes? You say that cannot be an arm's length transaction?

Mr. Jones: ... here you don't have an arm's length transaction ...

Here you have a corporation which is controlled and dominated by the transferor of the property. And the courts have distinguished the Brown case on that basis." (Tr. V-706-707).

...

When a controlling stockholder deals with his corporation it seems to me there is almost a presumption - an inference arises immediately that you don't have what is called an arm's length transaction."

...

I would say that the only point of such an inference is that it shows again control and domination by the seller and suggests a sham transaction." (Tr. V-709).

The foregoing are some of the reasons why the criteria applied by the government and/or the trial court are based on clearly erroneous findings of fact and misinterpretations of the law.

Having Now Abandoned In Its Brief The
Contention That The Transfer Was A Sham
And Arguing Instead That It Was Not In
Substance A Sale, The Holding Of
Commissioner v. Brown, 380 U. S. 563
(1965) Is Controlling Here And
Requires Reversal

The full circle has been completed by the government. Just as it finally did in this Court in Commissioner v. Brown, 9 Cir., 1965, 325 F. 2d 313, the government now concedes in footnote 12 at page 29 of its brief that it has abandoned the argument that this transaction was a sham. The footnote states:

"The Government's position is not that the transfer was a sham,... but that the 'sale' label attached to the transaction by the parties is not determinative of its substance and tax effect."

In short, the government is now making the same argument here which the Supreme Court said it made in Commissioner v. Brown, 380 U. S. 563 (1965).

"Having abandoned in the Court of Appeals the argument that this transaction was a sham, the Commissioner now admits that there was real substance in what occurred between

the Institute and the Brown family. The transaction was a sale under local law."

380 U. S. 569

"Whatever substance the transaction might have had, however, the Commissioner claims that it did not have the substance of a sale within the meaning of § 1222(3)."

(Underscoring supplied) 380 U. S. 570

Therefore, since in Commissioner v. Brown, supra, the Supreme Court was asked to, and did, give a definition of what "sale" meant as used in the Internal Revenue Code, the applicability of that decision to the instant case is clear.

In Commissioner v. Brown, supra, the Supreme Court ruled that the word "sale" as used in the Internal Revenue Code is to be given its ordinary meaning, and that therefore a "sale" is simply a transfer of property for a fixed price in money or its equivalent. Therefore, here there was a sale.

What the trial court and the government have done herein is refuse to follow the ratio decidendi of Commissioner v. Brown, supra. The trial court should be reversed for so doing.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

McLane & McLane

By

William Lee McLane
William Lee McLane

Nola McLane
Nola McLane

Certificate

I certify that, in connection with preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: August 7, 1968

William Lee McLane
William Lee McLane

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GYRO ENGINEERING CORPORATION, a
California corporation,

JUN 19 1968
Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (II-R. 706-750) is
officially reported at 276 F. Supp. 454 (C. D. Calif. 1967).

JURISDICTION

This appeal involves federal income taxes for the taxable
years 1959 and 1960 in the respective amounts of \$54,891.92
(I-R. 2-5) and \$48,386.06 (I-R. 6-8). The taxes in dispute were
paid on April 30, 1964. (I-R. 92.) Claim for refund was filed

on October 5, 1964, and was rejected on August 25, 1965. (I-R. 92-93.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on August 2, 1965, the taxpayer brought this action in the District Court for recovery of the taxes paid. (I-R. 2-8, 93.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1) and Section 1402(a)(2). The judgment of the District Court was entered on October 19, 1967. (II-R. 752.) Within sixty days thereafter, on November 2, 1967, a notice of appeal was filed. (II-R. 754.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the record warrants the District Court's conclusion that a 1959 transfer of depreciable properties to the taxpayer corporation by its controlling stockholders was in substance a contribution to its capital, not a bona fide sale; and that consequently (1) the taxpayer's basis for depreciation of the properties for federal income tax purposes was limited by Section 362 (a)(2) of the Internal Revenue Code of 1954 to their basis in the hands of the transferor-stockholders, and (2) the proceeds of a condemnation award received for other property were not used by taxpayer to "purchase" similar property within the meaning of the nonrecognition-of-gain provisions of Section 1033(a)(3).

STATUTES INVOLVED

The pertinent portions of the statutes involved will be found in the Appendix, infra.

STATEMENT

The facts as stipulated by the parties, supplemented by oral testimony, and found by the District Court may be summarized as follows:

There are two taxable periods involved in this suit for refund of federal income taxes. The first is the period beginning January 1, 1959, and ending October 31, 1959, a 10-month period. The second is the period beginning November 1, 1959, and ending October 31, 1960. (I-R. 47; II-R. 707-708.)

The taxpayer, Gyro Engineering Corporation, was incorporated in California in 1952 (I-R. 47, 59-63; II-R. 708) with a total authorized capital stock of ten thousand shares having a stated par value of \$1. per share and an aggregate value of \$10,000 (I-R. 48, 62-63; II-R. 708, 725). From November 1, 1958, to date the number of issued and outstanding shares of capital stock of taxpayer totaled ten thousand shares (the total authorized capital stock), for which \$10,000 was paid and of which 4,950 shares were and are owned by Chris Mowry, 550 shares were and are owned by Chris Mowry's wife (Natalie Mowry), 1,000 shares were and are owned by Patrick Mowry (a son of Chris and Natalie Mowry), 1,000 shares were and are owned by Marilyn Mowry (a daughter of Chris and Natalie Mowry), and 2,500 shares were and are owned by William Mowry (a brother of Chris Mowry). (I-R. 47-49, 84, 89; II-R. 708-709; V-R. 420, 422.) All money "paid in" for the stock issued by

taxpayer and representing the paid-in "capital" of taxpayer from the time of its incorporation throughout the years in suit was simply money deposited in the personal bank account of Chris and Natalie Mowry. Any actual cash representing the paid-in "capital" of taxpayer was supplied by Chris and Natalie Mowry. Thus, no actual cash moved when any stock was "subscribed." Rather, the bank account of Chris and Natalie Mowry simply remained intact. ^{1/} Indeed, a separate banking account for taxpayer was not opened until February 1, 1962. (I-R. 82-83; II-R. 709, 717-718; V-R. 443.)

The officers of the taxpayer from March 1, 1954, to March 1, 1961, were Chris Mowry (president), William Mowry (vice-president), and Natalie Mowry (secretary-treasurer). The same persons have been the directors of taxpayer from March 1, 1954, to the present. (I-R. 47; II-R. 708.)

From 1953 to and including the years 1959 and 1960, the taxpayer had no payroll in its own name and all payroll checks issued on its behalf were issued on the account of Chris and Natalie Mowry (hereafter sometimes referred to as "transferors"). (I-R. 83; IV-R. 256-257.) No federal withholding tax returns were filed by the taxpayer in 1958, 1959, or 1960. (I-R. 83; II-R. 719.) The federal withholding tax returns for maintenance personnel employed at the transferred buildings were filed in the names of one or another of the Mowrys as employers. No FICA returns were filed by

^{1/} William Mowry turned over to Chris Mowry in 1953 a certain business interest, which he had with Chris and Bob Mowry in the French held islands in the South Pacific, for the shares received by him in taxpayer. (I-R. 48-49.)

taxpayer during the years in suit. (II-R. 719, 720; V-R. 430-432.) No remuneration or fees have been paid to the officers and directors. Further, taxpayer has paid no dividends. (II-R. 720; V-R. 413; VI-R. 488.)

In September 21, 1955, taxpayer acquired title to an unimproved parcel of real property of approximately 70,000 square feet in South Pasadena, California, for \$7,800 (hereinafter referred to as the Paloma Street property). (I-R. 49-50, 89; II-R. 709.) With the exception of this purchase, taxpayer was, on the whole, inactive between 1953 and 1959. (I-R. 80-82; II-R. 713-714.) In addition, taxpayer did nothing with the Paloma Street property until 1958, when the County of Los Angeles condemned it. The amount of the compensation, therefore, became the subject of litigation. (I-R. 50; II-R. 709-710.) In late March of 1959, the amount of the award, which was \$30,896.65 after attorney's fees, was deposited in the joint account of Chris and Natalie Mowry, which account was also used by taxpayer. (I-R. 50, 86; II-R. 710.) The receipt of the award was not entered in the books of account of taxpayer; indeed there is no evidence that the taxpayer kept any books. (I-R. 86; II-R. 710.)

On January 1, 1959, taxpayer entered into what purported to be a written "sales and purchase agreement" with Chris and Natalie Mowry by which it purported to buy from them three parcels of improved real property consisting of apartment buildings and the land on which they are situated known as The Tropics, The Carousel, and The Orange Grove Circle Apartments, together with certain furniture and

equipment. The total "sale price" was purported to be \$3,164,000 payable \$30,000 down, the balance of the "sale price" after allowance for existing first mortgages to be evidenced by non-interest-bearing "promissory notes" in a total amount of \$2,343,361.50 due in amounts of \$30,000 semi-annually. The agreement called for an assignment of rents and management of the properties back to the transferors, exercisable in their sole discretion upon default, the insolvency of the buyer, or the happening of any event which would reasonably be expected to prevent buyer from carrying out its obligation. (I-R. 50-51, 71-75, 86-87; II-R. 710-711, 715-716.) By this, as well as by the informal control exercised by them, the transferors retained many of the same rights to manage the property, and to enjoy its income, that they had before the "sale." (II-R. 716.) Indeed, Chris Mowry, one of the transferors, dealt for all practical purposes for the taxpayer as he would for himself, and paid little heed to the amenities of doing business through the corporate form. As a practical matter, he dealt with the assets and business of taxpayer as he did with his own assets and business. No evidence was introduced to show that taxpayer was held out to third parties as the owner of the land or apartment buildings after the transfer and through the years in suit. (II-R. 721, 723.)

Taxpayer never had a telephone listed in its own name. Telephone listings have been maintained in either the name of the respective transferred apartments or in the name of the manager of each. (I-R. 83; II-R. 719.) The telephone, the expenses for which the taxpayer included among its business expenditures deducted on its tax return for the years in suit, was located in the personal apartment of the transferors and was listed in their name. (II-R. 719; V-R. 452; VI-R. 501-503.) For all practical purposes taxpayer maintained no office or formal place of business other than the residence of the transferors. (I-R. 82; II-R. 719.)

A deed evidencing the transfer of the apartment buildings to taxpayer was executed by Chris and Natalie Mowry, but was not recorded in the office of the County Recorder until March 17, 1961. Despite the fact that Chris Mowry testified that he had been involved in a number of sales and purchases of real property prior to the year 1959 and that he knew of the requirement for purchase of internal revenue documentary stamps on sales of real property, no internal revenue documentary stamps were placed upon the deed which transferred The Tropics, The Carousel, and The Orange Grove Circle Apartments to the taxpayer and no such stamps were purchased. (I-R. 88; II-R. 721; V-R. 348; VI-R. 485.)

At the time of the transfer, taxpayer had little or no cash or working capital, although it did expect to receive the then unliquidated amount of the condemnation award in the future. Taxpayer did

not have enough cash to make the down payment recited in the "sales agreement", and did not borrow cash for the down payment from any sources other than the transferors. (I-R. 50, 81-82, 86; II-R. 714-715; V-R. 347-348, 355, 422-426.) The condemnation award from the Paloma Street property was not received by taxpayer until March 20, 1959. (I-R. 50, 86; II-R. 715.) Therefore, no cash changed hands at the time of the transfer.

At the time that the "sales agreement" was framed, the only immediately foreseeable source of income to taxpayer was the rental income from the apartments to be transferred, and the parties must have intended that the apartment rentals would be used to make the payments on the notes. Indeed, such semi-annual "payments" as were "made" were made from such rental income. (I-R. 87; II-R. 716.) After the transfer, all of the taxpayer's funds were deposited in the personal general bank account of the transferors. Monies "paid" to the transferors as "sellers" of the apartments were not withdrawn but were simply represented by funds already in their personal account, which account was also used by taxpayer. (I-R. 82-83; II-R. 716-717; V-R. 443.) No book entries reflecting such payments were made by taxpayer; the taxpayer produced no books. (II-R. 716.)

Not only were the funds of the taxpayer mingled with those of the transferors, but the tax bills of taxpayer were billed to the transferors personally and all bills were paid by their personal checks. (II-R. 718, 720; IV-R. 250-251; V-R. 362, 450-455; VI-R.

494-496.) At least some of the checks in evidence were clearly for personal expenses of the Mowrys, yet they were included by taxpayer as its expenditures for which tax deductions were claimed for the years in suit. (II-R. 720; V-R. 450-455; VI-R. 494-496.) None of the leases executed in 1959 and 1960 on the apartments in the transferred buildings were executed in the name of the taxpayer as lessor; nearly all were in the name of Chris Mowry, one of the transferors, as lessor. (I-R. 89; II-R. 718.)

In connection with the transaction of January 1, 1959, the transferors sought the advice of tax counsel. (I-R. 89; II-R. 723-724.)

The Internal Revenue Service began its audit of the taxpayer's returns in early 1961. (I-R. 92.) After the transferors were notified of the audit (V-R. 344), they got in writing the appraisals for the fair market value of the property (II-R. 721-722; VI-R. 433), began to cause the taxpayer to issue leases in its name (II-R. 722; VI-R. 486-487), and opened a bank account for the taxpayer (I-R. 83). In addition, they recorded the deed of transfer. (II-R. 721.)

"Payments" on the "notes" given in the transfer involved were stopped in 1963. No "payments" have been made since. (I-R. 87; II-R. 725.) Moreover, the transferors took no steps to cause taxpayer to enforce their payment when "default" occurred. (II-R. 725; V-R. 438-443.) Taxpayer did pay on the notes that it owed to persons other than the transferors. (V-R. 439-440.) Chris Mowry testified that if additional financing were to be obtained by taxpayer, it

would be necessary for the transferors to subordinate taxpayer's "indebtedness" to them to any such loan. He further testified, with reservation, that he would be agreeable to such subordination.

(II-R. 725; V-R. 345.)

By the transaction the transferors purported to sell property allegedly worth \$3,164,000 on terms of less than one percent down (although, as noted above, even the alleged down payment of \$30,000 was not made at the time of the transfer) and non-interest bearing payments of \$60,000 per year over forty years. Even if all the scheduled semi-annual payments on the non-interest bearing notes had been timely made, the notes would not have been paid off for 39.03 years, or until the year 1999. (I-R. 50, 72, 86-87; II-R. 715.) The ratio of debt to equity at the time of the transfer was 316.4 to 1. Even if the amount of the condemnation award, which was not received as of January 1, 1959, were included, the debt-equity ratio would be about 100 to 1. (II-R. 725.)

Neither Chris nor Natalie Mowry was discharged or released by the mortgagees from their obligations under the first mortgages existing on the transferred properties when the properties were transferred to taxpayer. (I-R. 88; II-R. 722.)

The transferors had constructed the above-mentioned transferred apartment buildings in the early 1950's and had depreciated them under the so-called "accelerated depreciation" provisions of the Internal Revenue Code. The adjusted basis for purposes of depreciation of the three apartment buildings to the transferors immediately

prior to the sale was \$805,222.09. (I-R. 51, 89-91; II-R. 711.) After the sale, taxpayer on its federal income tax returns for 1959 and 1960, as well as later years not in suit, depreciated the apartment buildings upon the basis of the "sale" price of \$3,164,000, allocating a total cost of \$2,745,300 to the three buildings exclusive of furniture, equipment and land. (I-R. 51, 53, 54-55; II-R. 711-712.)

By virtue of the use of this "stepped-up basis" for computing its federal tax deductions for depreciation, the depreciation deductions cancelled out all of the taxable income of the taxpayer (consisting almost exclusively of rental income from the apartment buildings) for the years in suit. In addition, the transferors reported capital gain on the "sales" price on the installment basis, all of which gain was offset by claimed losses from a farming venture. (I-R. 88; II-R. 712.)

The taxpayer also claimed nonrecognition-of-gain treatment pursuant to Section 1033 of the 1954 Internal Revenue Code for the condemnation award on its federal income tax return for 1959, based upon its contention that the proceeds of the condemnation award were used to "purchase" similar property within the terms of Section 1033 of the Code by means of the January 1, 1959, transaction whereby it "purchased" the Tropics, Carousel, and Orange Grove apartments. In other words, the \$23,096.65 gain (excess of \$30,896.65 award proceeds over \$7,800 basis) from the condemnation of the Paloma Street property was not reported on the taxpayer's 1959 federal income tax

return. Instead, taxpayer deducted the gain from what it alleged to be the cost basis of the Orange Grove Circle Apartments on its 1959 federal income tax return. (I-R. 54, 86; II-R. 712.)

In deficiency notices for the taxable years 1959 and 1960, issued December 24, 1963, the Commissioner of Internal Revenue, inter alia, denied taxpayer the "stepped-up basis" for depreciation, determined that taxpayer must use its transferors' basis for depreciation, and likewise denied taxpayer nonrecognition-of-gain treatment on the condemnation award, on the ground that in substance and for federal income tax purposes, the transfer was not a bona fide sale, but rather was a contribution to taxpayer's capital. (I-R. 92, 103-109; II-R. 713.) Taxpayer paid the deficiencies asserted in the statutory notices plus interest on April 30, 1964, and filed its claim for a refund with the Internal Revenue Service on October 5, 1964. (I-R. 92-93.) Taxpayer filed its suit for refund in the District Court on August 2, 1965, or more than six months after filing its claim for refund. (I-R. 2, 93.) On August 25, 1965, its claim for refund was officially rejected. (I-R. 93.)

In this suit for refund the District Court sustained the Commissioner and found, inter alia, that the purported sale was in no sense a bargained or arm's length transaction (II-R. 723), that the transaction was principally "tax motivated", that the transfer was little more than a paper tax device or "gimmick" (II-R. 724), that the recited "price" for the transferred buildings was excessive in relation to their fair market value, and that the taxpayer presented

no credible evidence to indicate that an outside investor would have entered into this transaction. (II-R. 726.) From that adverse decision and the court's judgment entered in accordance therewith (II-R. 752), the taxpayer appeals (II-R. 754).

SUMMARY OF ARGUMENT

The basic question presented is whether the 1959 transfer of three apartment buildings (Tropics, Carousel, Orange Grove) to the taxpayer corporation by its controlling stockholders (the Mowrys) constituted for federal income tax purposes a genuine sale (as taxpayer contends), or a contribution to its equity capital (as the Government contends and the District Court concluded). Upon the answer to this single essentially factual question depends both the proper depreciation basis of the transferred properties, and taxpayer's right to nonrecognition-of-gain realized on condemnation of its other property (Paloma Street). If as the District Court found the transfer was in reality a contribution to capital, not a bona fide sale, then under 1954 Code Section 362(a)(2) (and corollary sections 118, 167(f), and 1011-1012) taxpayer is not entitled to use a stepped-up "sale" price as its basis for depreciation of the transferred properties, as it claims, but must carry over the stockholder-transferors' basis. Nor is taxpayer entitled (as it also claims) to the nonrecognition-of-gain benefit of Section 1033 on the condemnation of the Paloma Street property, since that Section requires (among other conditions precedent) that the proceeds of the condemnation award be used to "purchase"

similar property.

The record fully supports the District Court's conclusion that the purported sale was in substance a contribution to taxpayer's capital. It is settled by numerous decisions of this and other courts that whether a transfer of property by stockholders to their corporation constitutes for federal income tax purposes a contribution to its equity capital, or a sale (or loan), depends on the substance rather than the form of the transaction. That "notes" are taken by the stockholders from the corporation, and that the transaction is labelled a "sale", are not determinative of whether the purported sale is in reality a capital contribution and the notes representative of true indebtedness. Whether the notes create true indebtedness (a creditor interest) resulting from a bona fide sale, as distinguished from a proprietary (stockholder interest) resulting from a capital contribution hinges upon a variety of relevant factors laid down by the courts, no single factor being conclusive. It is equally settled that where (as here) the transaction is not at arm's length, but between a corporation and its controlling stockholders, it is subject to special scrutiny lest what is in reality a capital contribution be disguised as a sale (or loan); that the issue is one of ultimate fact; and that the trial court's conclusion as to the substance and true nature of the transaction, based upon consideration of the relevant factors, is entitled to affirmance unless clearly erroneous.

As is plain from its opinion (Findings and Conclusions), the District Court properly looked through form to the substance of the transaction in question. Applying the established criteria, and after carefully considering the entire record, it concluded that the transfer constituted a capital contribution to taxpayer corporation, not a bona fide sale. Far from being clearly erroneous, as taxpayer contends, the District Court's conclusion is amply supported--indeed demanded--by the record. Among the features supporting its conclusion are: at the time of the "sale" the taxpayer corporation was in a moribund state, without substantial assets, and the property "sold" to it consisted of capital assets essential to revival of its operations; the "notes" taken by the stockholders were unsecured; they bore no interest; payment of principal was contingent upon the fortune of the enterprise; the stockholder-"noteholders" made no effort to enforce payment of the "notes"; the due date for payment was postponed; the "notes" were in fact subordinated to claims of outside creditors; the corporation was "thinly" capitalized, the debt equity ratio being about 100 to 1; the stockholder-"noteholders" continued to manage the taxpayer's affairs in the same manner as before, and continued as before to mingle its funds with their own; the "sale" price was much greater than the fair market value of the transferred property; third parties acting at arm's length would not have entered into a sale upon the terms and conditions of the "sale" to taxpayer by its stockholders; the dominant purpose of transferring the property in

the form of a "sale" was tax avoidance, i.e., to obtain a stepped-up basis for the property; after internal revenue agents began to audit taxpayer's returns the stockholders attempted to "dress up" the "sale". Any one of the foregoing features would suffice to warrant the District Court's conclusion that taxpayer had failed to meet its burden of proving that the transfer was a bona fide sale, rather than a contribution to its equity capital. Viewed in combination they furnish solid support for that conclusion.

Taxpayer does not and cannot point to any authority which warrants--much less requires--reversal of the decision below. Each case in this field turns as it must on its own facts, and the cases upon which taxpayer relies are readily distinguishable. If any comparison is to be drawn between this case and others involving a similar question, then we submit that the instant case bears a closer resemblance to the many in which the purported sale has been held to constitute a capital contribution than to the isolated few upon which taxpayer relies.

ARGUMENT

The taxpayer corporation claims a stepped-up depreciation basis for three apartment buildings transferred to it by its controlling stockholders (the Mowrys) on January 1, 1959, on the theory that the transfer constituted a "sale" of the properties. See 1954 Code

Section 362(a), Appendix, infra, and Sections 167(f), and 1011-^{2/}1012.

It also claims that gain realized on the condemnation of its Paloma Street property is not recognizable, on the same theory, i.e., that the condemnation award proceeds were used to replace the condemned property by "purchase" of the apartment buildings. See Section 1033, Appendix, ^{3/}infra.

^{2/} Code Section 167(f) (after 1961 redesignated Section 167(g)) fixes the basis for depreciation of property at the adjusted basis provided in Section 1011 for determining gain or loss in its sale or other disposition. Section 1011 provides that the adjusted basis for determining gain or loss is the basis determined under Section 1012, which in turn provides that the basis shall be cost, "except as otherwise provided in this Subchapter and subchapter (C) * * *." One of the exceptions is contained in Section 362 of subchapter C, relating to "Basis to Corporations." Section 362(a)(2) provides that if property was acquired by a corporation "as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer." Corollary Section 118, Appendix, infra, excludes from gross income of a corporation contributions to its capital.

An analogous "basis" question is presented under Code Section 362(a)(1), where property is transferred to a corporation in a transaction to which Section 351 applies, i.e., a tax-free transfer by controlling stockholders in exchange for stock or securities of the transferee corporation. See e.g., Truck Terminals, Inc. v. Commissioner, 314 F. 2d 449 (C.A. 9th, 1963); Aqualane Shores, Inc. v. Commissioner, 269 F. 2d 116 (C.A. 5th, 1959) (involving the predecessor sections of the 1939 Code).

^{3/} Section 1033 permits nonrecognition-of-gain upon the "involuntary conversion" of property (including its condemnation) if within a specified period taxpayer "purchases other property similar or related in service or use to the property so converted."

It is the Government's position, sustained by the District Court, that the "sale" theory upon which both claims rest is untenable, because the purported sale in substance constituted a contribution to taxpayer's capital. If as the District Court concluded the transaction was in reality a capital contribution, not a sale, then it follows that taxpayer is required by 1954 Code Section 362(a)(2) to carry over the transferor-stockholders' basis for depreciation purposes, and that it is not entitled to the nonrecognition-of-gain benefit of Section 1033^{4/}. We submit that the District Court's decision upholding the Government's position is clearly correct and entitled to affirmance.

I

THE RECORD FULLY WARRANTS THE DISTRICT COURT'S CONCLUSION THAT THE TRANSFER TO TAXPAYER CORPORATION BY ITS CONTROLLING STOCKHOLDERS WAS IN SUBSTANCE A CONTRIBUTION TO ITS CAPITAL, NOT A BONA FIDE SALE, WITH THE RESULT THAT TAXPAYER WAS REQUIRED BY 1954 CODE SECTION 362(a)(2) TO CARRY OVER AS ITS BASIS FOR THE TRANSFERRED PROPERTY THE BASIS IN THE HANDS OF THE TRANSFEROR-STOCKHOLDERS

^{4/} Taxpayer's reliance (Br. 13-23) on Section 1239 is manifestly misplaced. That Section requires gains from sales of depreciable property between spouses or between a stockholder and a controlled corporation to be taxed as ordinary income rather than as capital gain, and does not come into play unless there is a bona fide sale. To assume that the instant transfer is to be tested by the provisions of Section 1239 is to beg the very point at issue--whether it constituted a bona fide sale or a capital contribution. In other words, we are not here concerned with whether the claimed "sale" is the kind denied capital gain benefit by Section 1239, but with whether it was really a sale at all.

- A. The District Court applied the relevant factors in determining whether the transfer was in reality a contribution to capital or a bona fide sale

It is axiomatic that the substance of a transaction, rather than its form, controls the tax consequences. The labels put upon the transaction may be disregarded if they do not conform to what actually took place.^{5/} Gregory v. Helvering, 293 U.S. 465 (1935); Griffiths v. Commissioner, 308 U.S. 355 (1939); Higgins v. Smith, 308 U.S. 473 (1940); United States v. Mattison, 273 F. 2d 13 (C.A. 9th, 1959); Factor v. Commissioner, 281 F. 2d 100 (C.A. 9th, 1960), certiorari denied, 364 U.S. 933 (1961); Wolf v. Commissioner, 357 F. 2d 483, 485 (C.A. 9th, 1966); Goldstein v. Commissioner, 298 F. 2d 562 (C.A. 9th, 1962); Truck Terminals, Inc. v. Commissioner, 314 F. 2d 449 (C.A. 9th, 1963); Zimmerman v. United States, 318 F. 2d 611 (C.A. 9th, 1963); Aqualane Shores, Inc. v. Commissioner, 269 F. 2d 116 (C.A. 5th, 1959).

^{5/} Use of the words "purchase" and or "sale" in the Stipulation of Facts (and the District Court's Findings) obviously was never intended, as taxpayer suggests (Br. 23-29), to concede that the transaction in question was a bona fide sale for federal income tax purposes, rather than a contribution to taxpayer's capital. These labels were employed below (and again here) merely for convenience, to indicate only what the parties purported to do. (II-R. 479-481, 727.) To subscribe to taxpayer's self-serving interpretation of the stipulation is to attribute to the Government a concession of the very issue which gave rise to this litigation; indeed, it would render this case moot. Plainly, the Government has not "stipulated" its case away.

In making a determination whether there is a true sale of property to a corporation or a contribution to its capital, the courts have laid down a number of factors to be considered. In O. H. Kruse Grain & Milling Co. v. Commissioner, 279 F. 2d 123, 125-126 (C.A. 9th, 1960), this Court said:

There are at least eleven separate determining factors generally used by the courts in determining whether amounts advanced to a corporation constitute equity capital or indebtedness. They are (1) the names given to the certificates evidencing the indebtedness; (2) the presence or absence of a maturity date; (3) the source of the payments; (4) the right to enforce the payment of principal and interest; (5) participation in management; (6) a status equal to or inferior to that of regular corporate creditors; (7) the intent of the parties; (8) "thin" or adequate capitalization; (9) identity of interest between creditor and stockholder; (10) payment of interest only out of "dividend" money; (11) the ability of the corporation to obtain loans from outside lending institutions.

See also, Peterson v. Commissioner, 380 F. 2d 1 (C.A. 1967); Truck Terminals, Inc. v. Commissioner, supra; Goldstein v. Commissioner, supra; Zimmerman v. United States, supra.

Factors considered by other courts in addition to the ones cited in O. H. Kruse Grain & Milling Co. v. Commissioner, supra, include the following: (1) whether the transfer had a business purpose; (2) whether the "price" of the properties, for which the notes were issued, was disproportionate to the fair market value of such properties; (3) whether the note holders, when default of the notes occurred, attempted to enforce the obligation; (4) whether

there was an absence of security; (5) whether assets were essential for the conduct of the corporate business; (6) whether the purported indebtedness was incurred to acquire capital assets; (7) whether there is an inordinately postponed due date; (8) whether there was confusion of the personal activities of transferor-stockholder with the activities of the corporation; (9) whether there was non-payment of interest, (10) whether there was a failure to insist upon payment until the corporation could "afford it"; (11) whether the note could reasonably be expected to be repaid only out of profits of the enterprise; and (12) whether the transfer was a result of arm's length bargaining.^{6/}

6/ Burr Oaks Corp. v. Commissioner, 43 T.C. 635 (1965), affirmed 365 F. 2d 24 (C.A. 7th, 1966), certiorari denied, 385 U.S. 1007 (1967); Kolkey v. Commissioner, 27 T.C. 37 (1956), affirmed 254 F. 2d 51 (C.A. 7th, 1958); Foresun, Inc. v. Commissioner, 348 F. 2d 1006 (C.A. 6th, 1965); Wood Preserving Corp. of Baltimore v. United States, 347 F. 2d 117 (C.A. 4th, 1965); Moughon v. Commissioner, 329 F. 2d 399 (C.A. 6th, 1964); Jewell Ridge Coal Corp. v. Commissioner, 318 F. 2d 695 (C.A. 4th, 1963); McSorley's Inc. v. United States, 323 F. 2d 900 (C.A. 10th, 1963); Montclair, Inc. v. Commissioner, 318 F. 2d 38 (C.A. 5th, 1963); Nassau Lens Co. v. Commissioner, 308 F. 2d 39 (C.A. 2d, 1962); P. M. Finance Corp. v. Commissioner, 302 F. 2d 786 (C.A. 3d, 1962); United States v. General Geophysical Co., 296 F. 2d 86 (C.A. 5th, 1961), certiorari denied, 369 U.S. 849 (1962); Brake & Electric Sales Corp. v. United States, 287 F. 2d 426 (C.A. 1st, 1961); Aqualane Shores, Inc. v. Commissioner, supra; Gilbert v. Commissioner, 262 F. 2d 512 (C.A. 2d, 1959), certiorari denied, 359 U.S. 1002 (1959); Camp Wolters Enterprises v. Commissioner, 230 F. 2d 555 (C.A. 5th, 1956), certiorari denied, 352 U.S. 826 (1956); Gooding Amusement Co. v. Commissioner, 236 F. 2d 159 (C.A. 6th, 1956), certiorari denied, 352 U.S. 1031 (1957).

The above factors are not exclusive. Indeed, this Court so recognized when it said in Kruse, supra, that there were "at least" eleven factors. See also Truck Terminals, Inc., supra. Contrary to taxpayer's assertion (Br. 65-68), the District Court considered the relevant factors in reaching its conclusion. Its consideration of taxpayer's attempt to "dress up the transaction", after it was questioned by the Internal Revenue agent, was clearly relevant when considered along with other relevant factors. Whether the transferred assets were necessary to revive a moribund corporation is essentially the same factor as whether the assets are required for the commencement of the corporate business. Further, whether there is an absence of a sinking fund is essentially the same criterion as whether the note could reasonably be expected to be paid by maturity out of profits. And whether there is a business purpose for the transaction or whether the only purpose is to avoid taxes is to restate the same factor in two different ways.

Subjective intent of the parties does not control; rather, it is the actual intent, which is to be objectively ascertained by looking beneath mere form to all relevant facts and circumstances. O. H. Kruse Grain & Milling Co. v. Commissioner, supra; Truck Terminals, Inc. v. Commissioner, supra; Wilbur Security Co. v. Commissioner, 279 F. 2d 657 (C.A. 9th, 1960); Camp Wolters Enterprises v. Commissioner, 230 F. 2d 555 (C.A. 5th, 1956), certiorari denied, 352 U.S. 826 (1956). As to the essential difference between

a creditor and a stockholder, this Court said in Wilshire & West Sandwiches v. Commissioner, 175 F. 2d 718, 721 (1949), that the stockholder intends to make an investment and take the risks of the venture, while the creditor seeks a definite obligation, payable in any event. Thus, in order for there to have been a sale, the transferor must actually become a creditor, that is acquire an absolute right to a fixed sum at a fixed maturity date, repayable in any event. As the Second Circuit stated in Gilbert v. Commissioner, 248 F. 2d 399, 402 (1957):

The classic debt instrument is an unqualified obligation to pay a sum at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor's income or lack thereof.

No single factor is decisive. Rather, the trial court must weigh the relevant factors together in determining whether the transfer of property was a sale or a contribution to capital (Moughon v. Commissioner, 329 F. 2d 399 (C.A. 6th, 1964)), and each case must be considered on its own facts.

The Commissioner's deficiency determination is presumptively correct and the burden is on the taxpayer in a refund suit not only to prove the Commissioner's determination to be erroneous, but to establish the exact amount of tax allegedly overpaid. Lewis v. Reynolds, 284 U.S. 281 (1932); Roybark v. United States, 218 F. 2d 164 (C.A. 9th, 1954); United States v. Pfister, 205 F. 2d 538 (C.A. 8th, 1953); David v. Phinney, 350 F. 2d 371 (C.A. 5th, 1965);

Missouri Pacific Railroad Co. v. United States, 338 F. 2d 668

(Ct. Cl. 1964). The Supreme Court in Lewis v. Reynolds, supra, p. 283, said that a refund suit is an action for money had and received, and stated "it is incumbent upon the claimant to show that the United States has money which belongs to him."^{7/}

B. The record amply supports the District Court's conclusion that the transfer was in reality a contribution to taxpayer's capital, not a bona fide sale

As pointed out above, no one factor is conclusive in determining whether the transfer was a contribution to capital or a sale; rather, the factors must be weighed together. As long as there is evidence to support the factual determination of the District Court on this issue, even though there be some evidence that could have

^{7/} The cases on which the taxpayer relies involved deficiency redetermination proceedings in the Tax Court, where the question is whether the Commissioner's deficiency notice is correct, and not refund suits in the District Court, where the taxpayer must prove that the Government owes him money. The Supreme Court emphasized this difference in Helvering v. Taylor, 293 U.S. 507, 514-515 (1935). See also David v. Phinney, supra; and Commissioner v. R. J. Reynolds Tobacco Co., 260 F. 2d 9, 15 (C.A. 4th, 1958).

Equally unfounded is taxpayer's assumption (Br. 51) that the Government is precluded from asserting new defenses in support of the assessment. The Government may raise any defense at trial to show that it has not over-collected the tax due from the taxpayer. Lewis v. Reynolds, supra, p. 283; United States v. Pfister, supra, pp. 541-542; Blansett v. United States, 283 F. 2d 474, 478 (C.A. 8th, 1960). In Blansett, supra, p. 478, the court said that "a deficiency assessment may be sustained upon any legal ground supporting it, even though the Commissioner did not rely thereon when the assessment was made. If the assessment is right on any theory it must be sustained." The statute of limitations bars only "the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." Lewis v. Reynolds, supra, p. 283.

supported a contrary decision, its decision must be affirmed. E.g., O. H. Kruse Grain & Milling Co. v. Commissioner, supra; Truck Terminals, Inc. v. Commissioner, supra.

After listing the factors which the courts have considered relevant in determining whether or not a transfer of property is a contribution to capital or a sale, the District Court analyzed the evidence which impelled it to conclude that the transfer was a contribution to capital. It considered the following factors:

(1) There was an absence of interest on the notes and agreement transferring the apartment buildings to the taxpayer. (I-R. 86; II-R. 710, 740; V-R. 438.)

(2) No due date was stated in the transfer documents; 1999 or 39.03 years from the date of transfer was the earliest date on which the notes would be paid off if all the payments were met on time, which was not the case. (I-R. 87.)

(3) The alleged indebtedness was incurred to acquire necessary capital assets and to revive the corporation from its essentially moribund state. Clearly it could not have gone into a new line of business (the acquisition of apartment buildings) on the scale which this transfer made possible without these assets. At the time of the transfer, the taxpayer had on hand an unliquidated claim against the County of Los Angeles for the Paloma Street property, which the county had condemned, and a small amount of cash. The claim against the county was settled for \$30,896.65 plus attorney's fees

on March 20, 1959, nearly three months after the transfer.^{8/} Between 1953 and 1959, the only activity undertaken by taxpayer was the purchase of the Paloma Street property. (I-R. 50, 80-82, 86, 89.) Further, on its California tax returns filed between 1952 and 1958 the taxpayer claimed to be inactive, did not file federal income tax returns between 1952 and 1958, and on its 1959 federal income tax return stated that it was inactive from 1956 to 1958. (I-R. 82.) Contrary to the taxpayer's claims (Br. 54-55, 61), findings of fact No. 20 (II-R. 713) (that the taxpayer was "substantially" inactive), and No. 43 (II-R. 724) (that the transfer was essential^{9/} to get taxpayer active), are well supported by the evidence.

^{8/} The taxpayer's contention (Br. 55) that finding of fact No. 23 (II-R. 714-715) is clearly erroneous is without merit, for the finding sets forth that at the time of the transfer there was an unliquidated claim and little cash or working capital. Evidently cash and working capital are used synonymously. At the date of incorporation, \$10,000 was given for taxpayer's stock. From this money, \$7,800 was used to purchase the Paloma Street property, and some money was used in 1952 and 1953 in an unsuccessful business venture. Therefore, very little money could have been on hand in 1959 for no additional money was contributed to the taxpayer. At the most there was \$1,850 in cash in the taxpayer. (I-R. 48-50; V-R. 422; VI-R. 489.)

^{9/} It is clear that the making of Scorby test equipment and test panels was abandoned by early 1953. (I-R. 80.) Further, it is not clear when taxpayer undertook its other testing. (IV-R. 239-240.) Whatever it might have done between 1953 and 1958 did not amount to much activity. Thus, to say "substantially" inactive is correct.

(4) The transferors failed to press for the payment on the "notes" when the taxpayer defaulted on them in 1964, even though taxpayer continued to pay its other creditors. (V-R. 435-437, 438, 439-440.) Thus, as the District Court found (I-R. 725), there ^{10/} was a subordination of the notes in fact.

(5) There was no security behind these notes, except for the assignment of rents in event of default. (I-R. 71-72.) Nor was any sinking fund provided to assure payment by the maturity date.

(6) The debt-equity ratio immediately after the transfer was grossly disproportionate. Even if the money receivable from the city were considered, the ration was about 100 to 1. If one did not consider the value of this unliquidated claim, the ratio would be 316.4 to 1. Thus, finding of fact No. 46 (II-R. 725) is supported by the evidence. Prior to the transfer, the operating capital was

^{10/} Further, the court found that Mr. Mowry hedged a little when he said that he would not accept subordination of his notes (V-R. 345):

The Court: Was this agreeable to you to subordinate?

The Witness: Provided that we got paid the proceeds of the loan. Otherwise no.

Indeed, the court did not believe Mr. Mowry when he indicated that he would not subordinate the notes if the taxpayer needed to obtain additional financing, because in fact he had allowed other creditors of the taxpayer to be paid after 1963 while he did not insist that taxpayer pay him the money due on the notes. Thus finding of fact No. 45 (II-R. 725) is correct.

small in comparison to the burden sought to be undertaken on January 1, 1959, and after the transfer there was an absence of operating capital. Indeed, taxpayer was in no position to make any large investment. (V-R. 421.)

(7) After the transfer, the transferors continued to operate the apartments as before. The funds of the taxpayer and the transferors were commingled in one bank account. (I-R. 82-83; V-R. 443-444.) No books were introduced into evidence to show that the accounts were kept separate. The tax bills were made in the name of the transferors. (V-R. 362.) Leases were executed in the transferors' names through 1959 and 1960. (I-R. 89.) Taxpayer never filled out withholding or FICA tax returns. Rather, these returns were filled out in the name of Mowry. (I-R. 83; V-R. 429-432.) Taxpayer had no separate place of business aside from the apartment or place of abode of the transferors. (V-R. 451-452.) No telephone was listed in the taxpayer's name. (I-R. 83.) Thus findings of fact 8, 12, 28, 29, 30, 31, 32, 33, 34, 37, and 39 (II-R. 709, 710, 716-721, 722-723), which the taxpayer challenges (Br. 51-52, 55-59), are all clearly supported by the evidence (V-R. 429-432, 443; VI-R. 496-499), and show clearly that the taxpayer was little more than the transferors' hip-pocket corporation.

(8) When the Commissioner began to check on the taxpayer's returns for 1959 and 1960, the transferors attempted to dress up the transaction. The audit of its returns began in early 1961. (I-R. 92.) The transferors then recorded the deed transferring the

property in the office of the County Recorder (I-R. 88), obtained for the first time written appraisals for the fair market value of the property (V-R. 433), began to cause the taxpayer to issue leases in its name (VI-R. 486-487), and opened a bank account for the taxpayer (I-R. 83). Although Chris Mowry testified that he recieved word of the Commissioner's audit in the late spring of 1961 (about six weeks after the recordation of the deed of transfer) (V-R. 344), the court disbelieved him. See finding of fact No. 36 (II-R. 721-^{11/}722).

(9) The transfer had little or no purpose other than to avoid taxes, i.e., to generate a stepped-up basis for depreciation. See Findings No. 16, 41, 42 (II-R. 712, 723-724). The transfer was a "hollow tax device or 'gimmick'." (II-R. 745.) The trial court was under no obligation to believe the self-serving testimony of Chris Mowry as to why the transfer took place. Foresun, Inc. v. Commissioner, 348 F. 2d 1006 (C.A. 6th, 1965); United States v. General Geophysical Co., 296 F. 2d (C.A. 5th, 1961), certiorari denied, 369 U.S. 849 (1962). Thus, the use of the words "sale" and "purchase" to describe the transfer is a misnomer, the transfer^{12/} being in reality a contribution to capital.

^{11/} Mowry testified that he did not remember who asked him to get the written appraisal. (V-R. 433; cf. page 58 of taxpayer's brief, which says that Mowry got the appraisal at the request of an Internal Revenue Agent). The agent's report is prepared long after the audit has begun.

^{12/} The Government's position is not that the transfer was a sham, as taxpayer argues (Br. 41-42), but that the "sale" label attached to the transaction by the parties is not determinative of its substance and tax effect.

(10) The price set forth in the transfer documents was in excess of its fair market value. The taxpayer's own valuation expert testified that the fair market value was \$2,975,000, or about \$189,000 less than the price (\$3,164,000) set forth in the "sale" documents. (III-R. 77, 86, 91.) The Government's expert witness testified that the fair market value was \$2,415,000, or \$749,000 less than the "sale" price. (V-R. 558.) Under the capitalization-of-income approach -- considered by taxpayer's expert to be "the most significant" valuation method (III-R. 61-96), the fair market value was found by taxpayer's expert to be \$2,427,750, or \$12,750 more than the Government's expert's valuation. Thus the price recited in the "sales and purchase" agreement (I-R. 71-72) was about 30 per cent in excess of the fair market value. See finding of fact No. 47. (II-R. 726.)

(11) The "down payment" (which was not paid on the date of the transfer) was less than one per cent (I-R. 71-72; II-R. 715); although Mr. Mowry knew of the requirement to place internal revenue documentary stamps on sales of real property, he failed to do it (V-R. 348; VI-R. 485); the transferors were not discharged from their personal obligation on the first mortgages (I-R. 88; II-R. 722); and the transferors continued to manage the property after the transfer as they had managed it before (II-R. 717).

(12) The transaction did not take place at arm's length, but was between a corporation and its controlling stockholders. In the words of the District Court, "the whole transaction seems unrealistic and uneconomic", and "no credible evidence was presented by plaintiff

[taxpayer] to indicate [that] outside investors would have entered into this transaction in the form and manner of execution it took." (II-R. 726.)

Taxpayer does not and cannot point to any authority which indicates reversible error in the decision below. Commissioner v. Brown, 380 U.S. 563 (1965), upon which it apparently chiefly relies (Br. 30-41), presented an issue far removed from that here presented, namely, whether an arm's length transfer of stock for a consideration measured by the transferee's earnings from the transferred property constituted a sale resulting in capital gain, as distinguished from a mere license resulting in ordinary income. ^{13/} Rather the issue here is similar to that decided by this Court in, for example, O. H. Kruse, supra, and Truck Terminals, Inc., supra, and other cases involving the question of a taxable sale vis a vis a nontaxable exchange or capital contribution (e.g., Aqualane Shores, supra; Kolkey, supra).

^{13/} Moreover, the facts in Brown were materially different from those of this case. First, the transaction there involved was negotiated only after "considerable good-faith bargaining at arm's length between the Brown family and the Institute." 380 U.S., pp. 568-569; see also pp. 567, 572. Second, "the primary motivation for the Institute was the prospect of ending up with the assets of the business free and clear after the purchase price had been fully paid, which would then permit the Institute to convert the property and the money for use in cancer research * * *." 380 U.S., p. 569. The Court stated that this meant that there had been a real shift of economic benefit in the transaction. In the instant case, there was no good-faith bargaining at arm's length (see Reef Corp. v. Commissioner, 368 F. 2d 125 (C.A. 5th, 1966), certiorari denied, 386 U.S. 1018 (1967)), nor was there a real change in economic benefit. Further, in Brown the purchaser was not under the control of the seller, as was the taxpayer herein. Finally, the sellers in Brown took security in the form of mortgages, whereas in the instant case the transferors made no formal security arrangements.

II

SINCE THE TRANSFER WAS IN SUBSTANCE A CONTRIBUTION TO CAPITAL, NOT A BONA FIDE SALE, IT DID NOT QUALIFY AS A "PURCHASE" WITHIN THE MEANING OF THE NONRECOGNITION-OF-GAIN PROVISIONS OF 1954 CODE SECTION 1033

Section 1033 of the 1954 Internal Revenue Code, Appendix, infra, provides that if property has been "involuntarily converted" into money as a result of its condemnation, any realized gain will not be recognized if within a specified period the taxpayer "purchases other property similar or related in service or use to the property so converted." (Emphasis supplied.) The legislative policy embodied in this section has been summarized by this Court in the following terms (Filippini v. United States, 318 F. 2d 841, 844 (1963), certiorari denied, 375 U.S. 922 (1963)):

The purpose of the statute is to relieve the taxpayer of unanticipated tax liability arising from involuntary condemnation of his property, by freeing him from such liability to the extent that he re-establishes his prior commitment of capital within the period provided by the statute.

Thus, in order to qualify for non-recognition under Section 1033, the taxpayer must have "purchased" property of like kind. Granting that the apartments and the Paloma Street property (the condemned property) were similar or related in service, for the reasons pointed out above (Point I) there was no "purchase" of the apartments with the condemnation proceeds of the Paloma Street property but a contribution of the apartments to taxpayer's capital. There was no

reinvestment of the condemnation proceeds by the taxpayer within the meaning of Section 1033, for there was no purchase. ^{14/} See A. A. Gallagher Warehousing Corp. v. Commissioner, decided January 22, 1965 (24 T.C.M. 38), affirmed sub nom. American Truck Rental Corp. v. Commissioner, 355 F.2d 928 (C.A. 3d, 1966).

Moreover, the gain realized on the condemnation of the Paloma Street property cannot qualify for non-recognition for the additional reason that the condemnation proceeds were not used to "purchase" similar property within the meaning of Section 1033(a)(3)(A)(ii), which provides that "the taxpayer shall be considered to have purchased property or stock only if * * * the unadjusted basis of such property or stock would be its cost within the meaning of section 1012." See also Treasury Regulations on Income Tax, Section 1.1033(a)-2(b)(4), Appendix, infra. As we have already shown (Point I, supra), by virtue of Section 362(a) the basis of the replacement property (apartment buildings) to the taxpayer was not its cost, but its basis in the hands of the transferor-stock-

14/ The undisputed facts relating to the condemnation confirm the District Court's conclusion that the proceeds were not used to "purchase" the apartment buildings. It was stipulated that the proceeds were paid to Chris Mowry on March 30, 1959 (I-R.50), and were deposited in the joint bank account of Chris and Natalie Mowry (the same account that was used by the taxpayer) and were not entered in the books or account of the taxpayer (I-R. 86). Presumably the funds remained there indefinitely subject to unfettered control of the taxpayer or Mowry. See Findings Nos. 51 and 52 (II-R. 727).

holder. Therefore, the District Court correctly held that Section 1033 was inapplicable, and that taxpayer was taxable on the gain realized from the condemnation of the Paloma Street property.

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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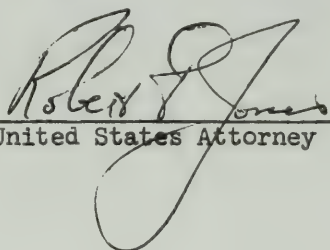
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 11th day of June, 1968.


Assistant United States Attorney

THE

PROCEEDINGS OF THE
ANNUAL MEETING OF THE
AMERICAN MEDICAL ASSOCIATION
Held at the Chicago Convention Center
Chicago, Illinois, June 1-5, 1914
Published by the American Medical Association
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APPENDIX

Internal Revenue Code of 1954:

SEC. 118. CONTRIBUTIONS TO THE CAPITAL OF A CORPORATION.

(a) General Rule.--In the case of a corporation, gross income does not include any contribution to the capital of the taxpayer.

(b) Cross Reference.--

For basis of property acquired by a corporation through a contribution to its capital, see section 362.

* * *

(26 U.S.C. 1964 ed., Sec. 118.)

SEC. 362. BASIS TO CORPORATIONS.

(a) Property Acquired by Issuance of Stock or as Paid-In Surplus.--If property was acquired on or after June 22, 1954, by a corporation--

(1) in connection with a transaction to which section 351 (relating to transfer of property to corporation controlled by transferor) applies, or

(2) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

* * *

(26 U.S.C. 1964 ed., Sec. 362.)

SEC. 1033. INVOLUNTARY CONVERSIONS.

(a) General Rule.--If property (as a result of its * * * condemnation or threat or imminence thereof) is compulsorily or involuntarily converted--

* * *

(3) Conversion into money where disposition occurred after 1950.--Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent herein-after provided in this paragraph:

(A) Nonrecognition of gain.--If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. For purposes of this paragraph--

(i) No property or stock acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

(ii) the taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (c) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of section 1012.

(B) Period within which property must be replaced.--The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending--

(i) one year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

(ii) subject to such terms and conditions as may be specified by the Secretary or his delegate, at the close of such later date as the Secretary or his delegate may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe.

*

*

*

(26 U.S.C. 1964 ed., Sec. 1033.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.1033(a)-2. Involuntary conversion where disposition of the converted property occurred after December 31, 1950. --

*

*

*

(c) Conversion into money or into dissimilar property.

*

*

*

(4) Property or stock purchased before the disposition of the converted property shall be considered to have been purchased for the purpose of replacing the converted property only if such property or stock is held by the taxpayer on the date of the disposition of the converted property. Property or stock shall be considered to have been purchased only if, but for the provisions of section 1033(c), the unadjusted basis of such property or stock would be its cost to the taxpayer within the meaning of section 1012. If the taxpayer's unadjusted basis of the replacement property would be determined, in the absence of section 1033(c), under any of the exceptions referred to in section 1012, the unadjusted basis of the property would not be its cost within the meaning of section 1012. For example, if property similar or related in service or use to the converted property is acquired by gift and its basis is determined under section 1015, such property will not qualify as a replacement for the converted property.

(26 C.F.R., Sec. 1.1033(a)-2.)

No. 22496

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vs.

UNITED STATES OF AMERICA

Appellee,

BRIEF FOR THE APPELLANT

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FILED

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Appellee.

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court wrote no opinion. Rather it signed and entered the Findings of Fact and Conclusions of Law submitted by the government. (R. 706-753).

JURISDICTION

This is an action arising under the internal revenue laws of the United States. Jurisdiction in the lower court was based on 26 U.S.C.A. § 7422; 28 U.S.C.A. § 1346 (a) (1), 1402 (a) (2). The jurisdiction of this court is based on 28 U.S.C.A. § 1291.

QUESTIONS PRESENTED

Whether the purchase price of \$3,194,000 for three (3) parcels of improved real property purchased by appellant on January 1, 1959 constitutes the cost basis in said property?

Whether \$30,896.65 received by appellant in 1959 as a condemnation award for real property known as the Paloma Street property is entitled to the nonrecognition of gain provisions in Section 1033 of the 1954 Internal Revenue Code.

STATEMENT

Appellant, Gyro Engineering Corporation, was incorporated in 1952. (R. 59).¹ Among its several corporate purposes, set forth in the corporate charter, were those of manufacturing gyroscopes and purchasing and owning real estate. (R. 59 - 60).² Its incorporators and first directors were Chris Mowry, Lee Reynolds and Natalie Mowry (R. 63)³, the latter being the wife of Chris Mowry. (R. 47).⁴ Gyro was founded by the above three incorporators primarily for the purpose of manufacturing gyroscopes and related equipment and to provide limited liability for Chris Mowry. (R. 79).⁵ The corporate charter provides that Gyro is authorized to issue only one class of stock, the total number consisting of 10,000 shares having a stated value of

¹Exhibit 1 of Stipulation of Facts No. 1, at pp. 1 and 2; Stipulation of Facts No. 1, pgh. 1, p. 2.

²Exhibit 1 of Stipulation of Facts No. 1, at pp. 1 and 2.

³Exhibit 1 of Stipulation of Facts No. 1, at p. 5.

⁴Stipulation of Facts No. 1, pgh. 4 at p. 2.

⁵Stipulation of Facts No. 2, pgh. 1 at p. 1.

\$1.00 per share and an aggregate value of \$10,000. (R. 62 - 63).

From the date of incorporation until the middle of April in 1953, Gyro made Scarby test equipment and test panels, but failed to obtain contracts from the Army and Navy for the manufacture of gyroscopes or related equipment. (P. 80 - 81).⁷ About the middle of April in 1953, Gyro abandoned its gyroscope and related equipment activities, settled its lease liability for office space it had used for its gyroscope and related equipment activities, and vacated those offices. (R. 80 - 81).⁸

From December 1, 1952 until August 20, 1953, the number of issued and outstanding shares of Gyro's capital stock totaled 5,000 shares of which 4,950 shares were owned by Chris Mowry and 50 shares were owned by Natalie Mowry. (R. 43).⁹ On April 20, 1953, 2,500 additional shares were issued to Natalie Mowry, and 2,500 additional shares were issued to Chris Mowry. (R. 48).¹⁰ The 2,500 shares issued to Chris Mowry on April 20, 1953 were transferred to William Mowry (R. 48),¹¹ Chris Mowry's then 32 year-old brother (R. 89),¹² on April 20, 1953. (R. 48).¹³ Chris and Natalie Mowry paid \$2,500 for the 2,500 shares issued

⁶Exhibit 1 of Stipulation of Facts No. 1, at pp. 4 and 5.

⁷Stipulation of Facts No. 2, pgh. 1 at pp. 1 and 2.

⁸Stipulation of Facts No. 2, pgh. 1 at pp. 1 and 2.

⁹Stipulation of Facts No. 1, pgh. 7 at p. 3.

¹⁰Stipulation of Facts No. 1, pgh. 7 at p. 3.

¹¹Stipulation of Facts No. 1, pgh. 7 at p. 3.

¹²Stipulation of Facts No. 2, pgh. 28 at p. 11.

¹³Stipulation of Fact No. 1, pgh. 7 at p. 3.

on April 20, 1953 to Natalie Mowry. (R. 48).¹⁴ Also, \$2,500 was paid for the 2,500 shares issued to Chris Mowry on April 20, 1953. (R. 48).¹⁵ William Mowry actually supplied the consideration for a 25 per cent stock interest in Gyro. (R. 49).¹⁶ Thereafter, from April 20, 1953 until November 1, 1958, there were no further changes of stock ownership. (R. 49).

From April 20, 1953 to 1955, Gyro investigated some parcels of real estate. (R. 80).¹⁷ Then on September 21, 1955, Gyro purchased, for investment purposes, at a cost of \$7,800 an unimproved parcel of South Pasadena, California, real property, comprised of approximately 70,000 square feet, and known as the Paloma Street property. (R. 49 - 50, 80).¹⁸

In addition to Gyro's real estate activities for the period subsequent to the middle of April in 1953 until January 1, 1959, Gyro investigated a number of different fields of scientific research including long range weather forecasting, how the eye sees color, and the unified field theory. (Tr. 239 - 240). Each of the above investigations subsequently bore fruit (Tr. 239). Thus Gyro now makes accurate long range weather forecasts, has determined how the eye sees color and has a patent pending covering three dimensional color television, and completed its work on the unified field theory. (Tr. 239 - 240).

¹⁴Stipulation of Facts No. 1, pgh. 7 at p. 3.

¹⁵Stipulation of Facts No. 1, pgh. 7 at p. 3.

¹⁶Stipulation of Facts No. 1, pgh. 7 at p. 4.

¹⁷Stipulation of Facts No. 2, pgh. 2 at p. 2.

¹⁸Stipulation of Facts No. 2, pgh. 2 at p. 2; Stipulation of Facts No. 1, pgh. 8 at pp. 4 and 5.

On or about November 1, 1958, Natalie Mowry surrendered 2,550 shares of Gyro's stock, and on the same day 1,000 shares were issued to Marilyn Mowry, a natural and minor daughter of Chris and Natalie Mowry, 1,000 shares were issued to Patrick Mowry, an adopted and minor son of Chris and Natalie Mowry, and 550 shares were issued to Natalie Mowry. (R. 49;¹⁹ Tr. 31 - 32, 331 - 332). Thereafter, from November 1, 1958 to at least April 29, 1966, the number of issued and outstanding shares of capital stock of Gyro totaled 10,000 shares of which the following number of shares were and are owned by the persons designated below:

Owner	No. of Shares
Chris Mowry	49.5% 4,950
Natalie Mowry	5.5% 550
Marilyn Mowry	10.0% 1,000
Patrick Mowry	10.0% 1,000
William Mowry	25.0% 2,500
Total:	10,000

In 1958 Gyro's Paloma Street property was condemned, and Gyro knew some months prior to January 1, 1958, that it would receive approximately \$30,000 on about January 1, 1959 as the condemnation award (Tr. 336 - 337).

Thereafter, "on January 1, 1959," Gyro "purchased from Chris and Natalie Mowry three (3) parcels of improved real property known and referred to respectively as (1) 'The Tropics', (2) 'The Carousel', and (3) 'The Orange Grove Circle Apartments'." (R. 50).²⁰

The written Sales and Purchase agreement entered into on

¹⁹Stipulation of Facts No. 1, pgh. 7 at p. 49 as amended by oral stipulation at trial, Tr. 41-42.

²⁰Stipulation of Facts No. 1, pgh. 10 at p. 5.

January 1, 1959 between Gyro, on the one hand, and Chris and Natalie Mowry, on the other hand, provided that the total purchase price of the said three parcels of real property was \$3,164,000 (R. 71),²¹ that a down payment of \$30,000 was required (R. 71),²² that Gyro assumed trust deed obligations on the three parcels totalling \$791,638.50 (R. 86; Tr. 42 - 43),²³ and that Gyro execute and deliver promissory notes totaling \$2,342,361.50 payable \$60,000 per year in two equal installments of \$30,000 each. (R. 71, 86 - 87).²⁴ The Sales and Purchase Agreement provided that, as further security for the payment of the said \$2,342,361.50 in promissory notes, Gyro was to execute and deliver an assignment of rents upon the default in payment of any \$30,000 payment. (R. 72). The said promissory notes were delivered by Gyro to Chris and Natalie Mowry (R. 50, 72 - 74).²⁵ Also, on January 1, 1959, Chris and Natalie Mowry "conveyed by a Grant Deed" the said three (3) parcels of improved real property." (R. 50).²⁶

The said purchase price of \$3,164,000 was within a reasonable range of the January 1, 1959 fair market value of the said three parcels of improved real property. (Tr. 71, 86, 91, 93; Plaintiff's Exhibit 1).

²¹Exhibit 4 at p. 1 attached to Stipulation No. 1.

²²Exhibit 4 at p. 1 attached to Stipulation No. 1.

²³Stipulation of Facts No. 2, pgh. 16 at lines 26 through 30 at p. 8 as amended by oral stipulation at trial, Tr. 42 - 43.

²⁴Stipulation of Facts No. 21, pgh. 16 at lines 30 - 32 at p. 8 and line 1 at p. 9.

²⁵Stipulation of Facts No. 1, pgh. 11 at p. 5.

²⁶Stipulation of Facts No. 1, pgh. 13 at p. 5.

At the time of the said January 1, 1959 purchase of the three parcels of improved real estate by Gyro, Chris and Natalie Mowry owned 55 per cent of Gyro's outstanding stock, William Mowry, Chris' adult brother, owned 25 per cent of Gyro's outstanding stock, and Chris and Natalie Mowry's two minor children owned 10 per cent each. (R. 49).²⁷ Since the said three parcels of improved real property were encumbered by trust deeds totalling \$791,638.50 whereas the purchase price was \$3,164,000, the equity of Chris and Natalie Mowry in said property was \$2,372,361.50. On such date, William Mowry, the owner of 25 per cent of Gyro's outstanding stock, was a man of financial substance who owned ranches and business interests in Mexico. (Tr. 335). Also, on January 1, 1959, it was the intention of Chris and Natalie Mowry to adopt more children, and in fact they later did adopt Marjorie and Alan. (Tr. 332).

On March 20, 1959 Gyro received the condemnation award for the Paloma Street property in the amount of \$30,896.65. (R. 50).²⁸

After the said purchase of the three improved parcels by Gyro, the latter reported in its federal income tax returns for the taxable period January 1, 1959 to October 31, 1959 and for the taxable period ending October 31, 1960 that its cost basis in the said three parcels of improved real property was the purchase price of \$3,194,000 (R. 51, 53, 54 - 55)²⁹ less the \$23,096.65 of gain realized from the condemnation of the Paloma Street property.

²⁷Stipulation of Facts No. 1, pgh. 7 at p. 4.

²⁸Stipulation of Facts No. 1, pgh. 9 at p. 5.

²⁹Stipulation of Facts No. 1, pghs. 17, 23 and 27.

Subsequently, the Commissioner of Internal Revenue, in a statutory notice of deficiency to Gyro dated December 24, 1963, adopted the conclusions, without setting forth any grounds therefore,³⁰ (1) that the cost basis to Gyro of the said three parcels of unimproved real property was not the purchase price but the cost basis of Chris and Natalie Mowry, and also (2) that Gyro realized gain of \$23,096.65 as a result of the condemnation award for the Paloma Street property. (R. 52,54 - 55).³¹ Thereafter on or about April 30, 1964, the claimed deficiencies for the taxable year January 1, 1959 to October 31, 1959 and the taxable year ending October 31, 1960 totalling \$84,127.44 plus \$19,150.54 of interest were paid by Gyro. (R. 92).³² Timely claims for refund therefor were filed on October 5, 1964, and the instant suits for refund were filed August 2, 1965. (R. 93, 2).

All issues except the proper cost basis to Gyro of the real property purchased from Chris and Natalie Mowry and whether gain was realized from the condemnation of the Paloma Street property have been resolved by the parties. This appeal is from the decision of the district court that Gyro's cost basis in the said real property is not the purchase price but the former cost basis of Chris and Natalie Mowry, and that Gyro is not entitled to non-recognition of gain from the Paloma Street condemnation award provided for in Section 1033 of the Internal Revenue Code of 1954.

³⁰R. 105 - 106; Tr. 168, 170 - 172.

³¹Stipulation of Facts No. 1, pghs. 19, 25 and 29.

³²Stipulation of Facts No. 2, pgh. 38 at p. 14.

The trial court erred:

1. In denying plaintiff's motion for a ruling that the government had the burden of proof with respect to its contention that there was no sale to Gyro but a contribution to its capital. (R. 150, Tr. 39).

2. In denying plaintiff's motion for a ruling that the statute of limitations had run with respect to the government's contention that there was no sale but a contribution to capital. (R. 147, Tr. 24).

3. In denying plaintiff's motion for a ruling that the government had the burden of proof with respect to its contentions set forth in paragraphs 4, 8, and 11 of paragraph VIII of the pre-trial order under the designation "Defendant's issues of law". (R. 150, Tr. 39).

4. In denying plaintiff's motion for a ruling that the statute of limitations had run with respect to the government's contentions set forth in paragraphs 4, 8, and 11 of paragraph VIII of the pretrial order under the designation "Defendant's issues of law". (R. 147, Tr. 24).

5 - 38. In finding as fact Nos. 8, 10, 12, 13, 16, 19, 20, 23, 25, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54 of the Findings of Fact. Wherein each finding of fact is erroneous is set forth under each separate finding in Point X, infra, all of which is incorporated herein by reference as follows:

Specification of Error

Finding of Fact

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39. In not ruling that Congress has considered the practice of selling depreciable assets to controlled corporations and has responded with the precise provisions of narrow application set forth in Section 1239 allowing a stepped up basis to a controlled corporation whether or not the gain is ordinary income or capital gain.

40. In not ruling that Gyro purchased the apartments as was stipulated by the government in Stipulation of Facts No. 1.

41. In refusing to enforce the stipulation referred to in 40 above.

42. In finding as fact that Gyro purchased the apartments and then concluding there was so sale by Chris and Natalie Mowry.

43. In not finding that there was a transfer of property for a fixed amount of money herein, and that such is a sale within the meaning of that term as used in the Internal Revenue Code and as interpreted in Commissioner v. Brown, 380 U. S. 563 (1965).

44. In not finding that the government abandoned its sham argument.

45. In not finding as fact that there was a contribution to capital.

46. In concluding under its Conclusion of Law No. XLI that the sale to Gyro was a contribution to capital.

47. In ruling that the transfer to Gyro was a sham and then ruling there was a transfer which it then labeled a contribution to capital.

48. In applying to the question of whether there was a sale or contribution to capital the seventeen criteria set forth in Conclusions of Law XXI through XXXVIII.

49. In concluding in Conclusion of Law XL that plaintiff had the burden of proving there was a sale and did not carry it.

50. In concluding in Conclusion of Law XLI that the transfer was a sham and must be deemed a contribution to the capital of Gyro.

51. In concluding in Conclusion of Law XLII that Gyro's cost basis in the property acquired January 1, 1959 is limited to the cost basis of Chris and Natalie Mowry.

52. In concluding in Conclusion of Law XLVIII that Gyro did not re-establish its prior commitment of capital.

53. In concluding in Conclusion of Law XLIX that there was no purchase or reinvestment of the condemnation award within the meaning of Section 1033.

The decision below not only contravenes several stipulations that Gyro purchased three apartment house developments for a purchase price of \$3,164,000, but it refused to follow the decision of the Supreme Court in Commissioner v. Brown, 380 U. S. 563 (1965), was induced by defendant's citation of Murphy Logging Co. v. United States, 239 F. Supp. 794, which was later reversed by this Court, 378 F. 2d 222, constitutes a gross case of judicial legislation which nullified the action taken by Congress to deal with sales of depreciable assets to a controlled corporation, and is not supported by the case law interpreting Section 362 (a) (2) of the Internal Revenue Code of 1954, the section relied on by the government and the trial court. Furthermore, the decision below, if allowed to stand, will cause, as shown hereinafter, a monetary loss to Chris and Natalie Mowry of \$1,067,580.67 in addition to the tax consequences herein.

I

Where Congress Has Considered The Practice Of Selling Depreciable Assets To Controlled Corporations, And Has Responded With The Precise Provisions Of Narrow Application Set Forth In Section 1239 Which Did Not Deny The Fact Or Occurrence Of A Sale, The Commissioner Cannot, Via The Stratagem Of Contending There Was No Sale, Invade The Policy Of Congress And Thereby Fashion A Broader Rule. Commissioner v. Brown
380 U. S. 563, 578-579 (1965).

Section 1012, Internal Revenue Code of 1954, requires that "the basis of property shall be the cost of such property, except as otherwise provided . . . in subchapter C." If the rule were otherwise and a purchaser of real property for \$3,164,000 were required to assume the lower cost basis of the sellers (\$805,222.09), such purchaser would be in the untenable economic position, upon a resale for \$3,164,000, of having to pay the first seller \$3,164,000 of purchase price and having to pay federal income tax of \$589,694.47 on a resale gain of \$2,358,777.91 occurring more than six months after the purchase.³³ In short, the purchaser would lose \$589,694.47 simply as a result of buying the property for \$3,164,000 and reselling it for \$3,164,000 if he is required to use as his cost the low cost basis of the person from whom he bought rather than the purchase price of \$3,164,000.³⁴ And that is precisely the position Gyro is now in as a result of the trial court's decision that its cost basis is the \$805,222.09 of Chris and Natalie Mowry rather than its purchase cost of \$3,164,000.

The foregoing is the economic reason why, as will be shown below, Congress refused to change the rules with respect to the cost basis of the purchaser when it legislated in regard to the problem posed by sales of depreciable property to controlled

³³Upon a resale of such property for \$3,164,000, there would be gain of \$2,358,777.91 if the lower cost basis of the seller (\$805,222.09) had to be used by the first purchaser for \$3,164,000.

³⁴Paying \$3,164,000 to the first seller plus \$589,694.47 of federal taxes upon a resale for \$3,164,000 while receiving only \$3,164,000 upon the resale results in a loss of \$589,694.47.

corporation, and permitted the stepped up cost basis to the transferee corporation to remain undisturbed.³⁵

In 1951, after a request from the Commissioner of Internal Revenue,³⁶ Congress acted with respect to sales of depreciable assets to corporations controlled by the sellers of such assets. The House of Representatives Committee on Ways and Means explained Section 310 of H. R. 4473 as follows:

"Section 310 of this bill is intended to forestall the practice of selling depreciable assets to controlled corporations in order to obtain the substantial tax benefits available under existing law. This practice which is reported by the Bureau of Internal Revenue to be of growing importance, may be illustrated as follows: Assume that a husband and wife own and operate a corporation engaged in retail trade, that they also own as individuals the building used by this corporation and that the current value of the building is well in excess of its adjusted basis. If the building is sold to the corporation, a capital-gains tax will ordinarily be paid, but the building then has, in the hands of the corporation, an adjusted basis which is greater than the basis in the hands of the individual shareholders by the amount of the gain realized on the

³⁵3B Mertens, Law of Fed. Tax. § 22.25 at p. 135.

³⁶1951 Cum. Bull. July-Dec. at p. 376; H. R. Rep. No. 586, 82nd Cong., 1st Sess.

sale to the corporation. The property being depreciable the corporation will then be able to write off the increase in the adjusted basis over the remaining life of the building. The resulting additional depreciation charges are, of course, an offset to ordinary income. Thus, in effect, the immediate payment of a capital-gains tax has been substituted for the elimination, over a period of years, of the corporate income taxes on an equivalent amount. The substantial differential between the capital-gains rate and the ordinary rates makes such a substitution highly advantageous when the sale may be carried out without loss of control over the asset because the corporation to which the asset is sold is controlled by the individuals who make the sale.

"Section 310 of this bill eliminates the tax advantage from such transactions by denying capital-gains treatment to the transferor with respect to sales or exchanges of depreciable property between a husband and a wife, or between an individual and a corporation, more than half of the outstanding stock of which is owned by or for him directly or indirectly. For the purpose of determining ownership of stock an individual will be considered as owning a portion of the stock held by a corporation, partnership, estate or trust which reflects his interest as a shareholder, partner or beneficiary. He will also be considered as owning stock owned

directly or indirectly by or for his spouse and if he and his spouse own more than 10 percent of the outstanding stock of a company he will also be considered as owning stock held directly or indirectly, by or for his brothers and sisters, ancestors and lineal descendants." 1951 Cum. Bull. July-Dec. at p. 376; H. R. Rep. No. 586, 82nd Cong., 1st Sess. Further explanation is found at 1951 Cum. Bull. July-Dec. at pp. 444-445.

Later in 1951 the Senate's Committee on Finance, in Sen. Rep. No. 781, refused to approve Section 310 of the House of Representatives 4473, and eliminated the House provision from the Senate Bill. 1951 Cum. Bull. July-Dec. at p. 507, Sen. Rep. No. 781, 82nd Cong., 1st Sess.

Thereafter, in 1951, after conferences between the managers of House of Representatives bill and the managers of the Senate amendments, it was agreed that both would recommend to their respective Houses with respect to Section 310 of H. R. 4473 that:

"The House recedes with an amendment which adds a new subsection (o) to section 117 of the Internal Revenue Code so as to provide that in the case of a sale or exchange, directly or indirectly, of depreciable property (1) between husband and wife, or (2) between an individual and a corporation in which he, his spouse and his minor children and minor grandchildren own more than 80 percent of the value of the outstanding stock, any gain recognized to the transferor shall be considered ordinary income and not capital gain." (Under-scoring supplied) 1951 Cum. Bull. July-Dec. at p. 631,

In short the legislative process in Congress refused to enact into law the provisions of the House of Representatives' bill that a sale of depreciable property was to be denied capital gain treatment if the transferor owned more than 50 percent of the corporation's stock and that if such seller owned more than 10 percent of the corporation's stock then any stock owned by his brother was to be added in determining whether such transferor's stock equalled the percentage required before capital gain treatment was denied. Rather it was agreed by the two Houses that in order for the law to deny capital gain treatment on the sale of depreciable property to a controlled corporation, the transferor and his minor children and minor grandchildren had to own at least 80 percent of the value of such corporation's stock, and in computing such percentage the stock owned by such transferor's brother could not be included. Furthermore, the Congress stamped its approval on the capital gain status of such a sale of depreciable property even where the transferor and his adult children owned all of the outstanding stock.

Thus, Section 117 (o) of the 1939 Internal Revenue Code was enacted embodying the above agreement reached by the House of Representatives and the Senate.³⁷ Section 117 (o) remained

³⁷Section 117 (o), Internal Revenue Code of 1939 provides:

"(o) Gain From Sale of Certain Property Between Spouses or Between an Individual and a Controlled Corporation. -

(1) Treatment Of Gain As Ordinary Income. - In the case of a sale or exchange directly or indirectly of property described in paragraph (2) -

Neither in 1951 nor later did Congress attempt to deal with the tax consequences of sales of depreciable property to controlled corporations by changing the fundamental rules that the cost basis of such property to the transferee corporation is its purchase price.

Nevertheless, after Congress was persuaded by the Bureau of Internal Revenue to legislate respecting "the practice of selling depreciable assets to controlled corporations",³⁸ and did so by permitting the stepped-up cost basis but denying capital gain treatment only to transferors who held certain stock interests in the acquiring corporation, the Commissioner of Internal Revenue now seeks, by contending that such a transfer is a sham and therefore a contribution to capital under Section 362 (a) (2), to render meaningless the precise provisions with narrow application which Congress chose to deal with the problem.

In Commissioner v. Brown, 380 U. S. 563 (1965), where the Supreme Court rejected arguments by the Commissioner that the transaction there "did not have the substance of a sale" within the meaning of the Internal Revenue Code (page 570), it first held that the word "sale" as used in the Internal Revenue Code

(A) between a husband and wife; or
(B) between an individual and a corporation more than 80 per centum in value of the outstanding stock of which is owned by such individual, his spouse, and his minor children and minor grandchildren; any gain recognized to the transferor from the sale or exchange of such property shall be considered as gain from the sale or exchange of property which is neither a capital asset nor property described in subsection (j). . ."

³⁸Id at n. 36.

was to be given its ordinary meaning which was "a transfer of property for a fixed price in money or its equivalent" and then, at pages 578-579, gave an equally important reason for rejecting the Commissioner's arguments:

"There is another reason for us not to disturb the ruling of the Tax Court and the Court of Appeals. In 1963, the Treasury Department, in the course of hearings before the Congress, noted the availability of capital gains treatment on the sale of capital assets even though the seller retained an interest in the income produced by the assets. The Department proposed a change in the law which would have taxed as ordinary income the payments on the sale of a capital asset which were deferred over more than five years and were contingent on future income. Payments, though contingent on income, required to be made within five years would not have lost capital gain status nor would payments not contingent on income even though accompanied by payments which were. Hearings before the House Committee on Ways and Means, 88th Cong., 1st Sess., Feb. 6, 7, 8 and 18, 1963, Pt. I (rev.), on the President's 1963 Tax Message, pp. 154-156.

"Congress did not adopt the suggested change but it is significant for our purposes that the proposed amendment did not deny the fact or occurrence of a sale but would have taxed as ordinary income those income-contingent payments deferred for more than

five years. If a purchaser could pay the purchase price out of earnings within five years, the seller would have capital gain rather than ordinary income. The approach was consistent with allowing appreciated values to be treated as capital gain but with appropriate safeguards against reserving additional rights to future income. In comparison, the Commissioner's position here is a clear case of "overkill" if aimed at preventing the involvement of tax-exempt entities in the purchase and operation of business enterprises. There are more precise approaches to this problem as well as to the question of the possibly excessive price paid by the charity or foundation. And if the Commissioner's Approach is intended as a limitation upon the tax treatment of sales generally, it represents a considerable invasion of current capital gains policy, a matter which we think is the business of Congress, not ours.

"The problems involved in the purchase of a going business by a tax-exempt organization have been considered and dealt with by the Congress. Likewise, it has given its attention to various kinds of transactions involving the payment of the agreed purchase price for property from the future earnings of the property itself. In both situations, it has responded, if at all, with precise provisions of narrow application. We consequently deem it wise to 'leave to the Congress the fashioning of a rule which, in any event,

must have wide ramifications.' American Automobile Ass'n. v. United States, 367 U. S. 687, 697." (Under-scoring supplied)

Likewise, the problems involved in the practice of selling depreciable assets to controlled corporations in order to obtain a stepped-up cost basis were considered and dealt with by the Congress. It responded with precise provisions of narrow application set forth in Section 1239 which was formerly Section 117 (o). In doing so it did not deny the fact or occurrence of a sale but taxed as ordinary income the payments received by any sellers if the latter owned 80 per centum or more of the purchasing corporation's stock.

The foregoing holding of Commissioner v. Brown, supra, makes it clear that where Congress has considered and dealt with the problems involved in the selling of depreciable assets to corporations in which the seller has some measure of control, and has responded with precise provisions of narrow application, the Commissioner cannot, via the stratagem of contending there was no sale, invade the policy of Congress and fashion a broader rule in order to prevent the stepping-up of cost basis of depreciable assets. Congress, which has been legislating with respect to tax avoidance problems for over a half a century, knows what it is doing. It is not within the Commissioner's power to usurp the function and power of Congress.

In the instant case it was stipulated by the government that Chris Mowry's adult brother, William Mowry, paid for and owned 25 per centum of Gyro's outstanding stock from April 20, 1953 through January 1, 1959 (the date when Gyro purchased the improved

real property) and to at least April 29, 1966. Thus, the Commissioner of Internal Revenue could not under Section 1239 treat the gain realized by Chris and Natalie Mowry on the January 1, 1959 purchase by Gyro as ordinary income since Chris and Natalie Mowry did not own more than 80 per centum of Gyro's outstanding stock.

Therefore, what should the Commissioner of Internal Revenue do? Abide by the limitations of the law (Section 1239) enacted after a compromise between the House of Representatives and the Senate, or try to defeat Congress with judicial approval? In the words of the Commissioner's agent who prepared the notice of deficiency herein (Tr. 164), the sale from the Mowrys to Gyro was "considered to be a contribution to capital" under "the provisions of Section 362 (a) (2)" because there was "no requirement for stock control or ownership under that Section." (Tr. 196).

II

The Government Stipulated Herein That Gyro Purchased The Real Property On January 1, 1959, While Paragraph III Of The Pretrial Order Provided That No Proof Of That Fact Was Required, And Hence The Trial Court Erred In Finding That There Was No Sale But A Capital Contribution.

On May 11, 1966, the government filed Stipulation No. 1 in the trial court (R. 46). That stipulation begins by stating:

"It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel,

that the facts hereinafter stated shall be taken as true for the purposes of this action. . . ."

There is no provision or qualification therein that such facts set forth a sham or are true in form only or describe only the form of the transaction. Nor are there quotation marks around the words hereinafter relied on by appellant.

At page 5 of Stipulation No. 1, at lines 13 through 17 (R. 50), the government stipulated that the following shall be taken as true:

"Gyro Engineering Corporation purchased from Chris and Natalie Mowry three (3) parcels of improved real property known and referred to respectively as (1) "The Tropics", (2) "The Carousel", and (3) the "Orange Grove Circle Apartments". (Underscoring supplied).

There is no language anywhere in such stipulation stating that Gyro did not purchase the said property but received it as a contribution to capital.

Thereafter, in the same stipulation, after reciting that Chris and Natalie Mowry conveyed the real property on the same day, January 1, 1959, at page 6, at lines 23 and 24 (R. 51) the government stipulated that the following shall be taken as true.

"The total purchase price of the Tropics was allocated by Gyro Engineering Corporation as follows:"
(Underscoring supplied).

Also, at page 8 of the same stipulation, at lines 20 and 21 (R. 53) the government stipulated that the following shall be taken as true:

"The total purchase price of the Carousel was

allocated by Gyro Engineering Corporation as follows:"

(Underscoring supplied).

And again, at page 9 of the same stipulation, at lines 25 through 31 (R. 54), the government stipulated that the following shall be taken as true:

"Gyro Engineering Corporation subtracted from the total purchase price of the South Orange Grove Apartments the sum of \$23,096.65 which was the amount of the gain realized from the condemnation of the Paloma Street property, referred to in Paragraph 8 and 9 above, and allocated the balance of the purchase price, or \$2,636,903.65 as follows."

(Underscoring supplied).

Nor is there any language in the said stipulation qualifying the above reference to the purchase by Gyro.

Subsequently, in the pretrial order filed June 20, 1966, at paragraph III on page 2 thereof, the following is found:

"The facts set forth in Stipulation of Facts Number One and Stipulation of Facts Number Two are admitted and require no proof." (Underscoring supplied).

Paragraph IV of the pretrial order contains no reservation by the government to above referred to stipulated facts. Since the government stipulated, as shown above, that "Gyro Engineering Corporation purchased from Chris and Natalie Mowry" the three parcels of real property, paragraph III of the pretrial order provided that appellant was not required to prove that "Gyro Engineering Corporation purchased from Chris and Natalie Mowry" the three parcels of real property.

At the opening of the trial on November 22, 1966, Stipulation of Facts No. 1 was admitted into evidence without objection by the government except as to the reservations set forth in paragraph IV of the pretrial order, none of which are directed to the stipulation that Gyro purchased the three parcels of real property (Tr. 39-41). During the trial, no request was made by the government to be relieved from the said stipulation that Gyro purchased the three parcels or from the provision of the pretrial order that such fact was admitted and required no proof by Gyro.

Therefore, it was error for the trial court to find that Gyro did not purchase the three parcels, that the sale was purported, that it was a sham, and was instead a contribution to Gyro's capital (R. 634, 747). The law is clear that parties may validly stipulate as to evidential matters, and stipulate to dispense with the necessity of evidence to prove designated facts. Great Northern R. Co. v. U. S., 318 U. S. 262. Courts are bound to enforce stipulations which parties may validly make which do not violate public policy. McGrath v. Tadayasu Abo, C. A. Cal., 186 P. 2d 766; Morse Dry Dock & Repair Co., 291 N. Y. S. 995, 249 App. Div. 794; Esch v. Forster, 123 Fla. 905, 168 So. 229. Courts have no power to make findings contrary to the terms of a stipulation. Capitol National Bank of Sacramento v. Smith, 62 Cal. App. 2d 328, 144 P. 2d 665, or render a judgment not authorized by its terms. Miskind v. Superior Court in and for Fresno County, 81 Cal. App. 2d 360, 183 P. 2d 95.

Furthermore, Finding of Fact 53 (R. 727), signed by the trial court, only serves to illustrate the grossness of the error. That finding stated:

"The occasional uses of the word 'purchase' in the stipulation of fact were not intended to be, nor are they, stipulations that the transaction was a bona fide sale for federal income tax purposes. Such uses of the word 'purchase' were meant to refer to the form of the transaction, and not to its substance for purposes of federal tax law."

Aside from the incongruity of finding that words used in a stipulation filed in a federal tax refund case are not meant to refer to the nature of the transaction for federal tax purposes, there are other good reasons why such a finding herein is error.

There is not one iota of evidence to support such finding of fact. No testimony was introduced by the government at the trial nor was documentary evidence introduced with respect to the meaning of the stipulation. What did happen was that after the trial was completed and the record closed, appellant presented full oral argument to the trial court that the government had stipulated that Gyro purchased the real property. (Tr. 631-635). Possibly because a stipulation cannot be repudiated or withdrawn from by one party without the consent of the other, except by leave of the court on cause shown,³⁹ and this is especially true after it has been so acted on that the parties cannot be placed

³⁹Jones v. U. S., 7 Cir., 1934, 72 F. 2d 873; General Electric Co. v. Wagner Electric Mfg. Co., C. C. S. D. N. Y. 1903, 123 F. 101, Aff'd. 130 F. 772; Gonzales v. Pacific Greyhound Lines, 34 Cal. 2d 749, 214 P. 2d 809; Palmer v. City of Long Beach, 33 Cal. 2d 134, 199 P. 2d 952; Andrew v. Bankers' & Shippers' Ins. Co. of New York, 125 Cal. App. 24, 13 P. 2d 515.

in statu quo,⁴⁰ the government never filed a post-trial motion or proceeding to be relieved from the stipulation. Instead, nearly two and one-half months later, as an appendix to its brief, the government's advocate who signed the stipulation and also tried the case, submitted, as an appendix to the government's brief, a self-serving argument in the form of an affidavit that it was not his understanding or intention to stipulate that Gyro purchased the improved real property. (R. 480).

The courts have power to relieve the parties from a stipulation upon a proper application and a showing of sufficient cause. Palmer v. City of Long Beach, 33 Cal. 2d 134, 199 P. 2d 952, 956. However, proper application is required,⁴¹ and relief will be denied where the stipulation has been acted on so that the parties cannot be placed in statu quo,⁴² or where one of the parties has received a benefit from the agreement,⁴³ or where an undue advantage would result in favor of the party seeking the relief,⁴⁴ or where the setting aside of the stipulation would result in serious injury to the other party.⁴⁵ Here the government

⁴⁰Johnson v. Wright, 19 Ga. 512.

⁴¹A party to a stipulation who desires to have it set aside should seek to do so by a direct proceeding, usually by a motion on notice. Chicago v. Drexel, 30 N. E. 774, 141 Ill. 89; Duncombe v. Smith, 139 Fla. 497, 190 So. 796: In order to obtain relief against stipulation, regular course is not to ignore or attempt to evade it, but to make seasonable affirmative application to court on formal motion on notice; Kristel v. Steinberg, 69 N. Y. S. 2d 476, 188 Misc. 500.

⁴²Bond v. Bond, 24 N. Y. S. 2d 169, 260 App. Div. 781.

⁴³C. J. p. 95 note 41.

⁴⁴Liebernecht v. Great Northern R. Co., 110 Minn. 457, 126 N. W. 71.

⁴⁵Clark v. Delaware & H. R. Corp., 283 N. Y. S. 739, 245 App. Div. 447.

did not file a proper application to be relieved, and therefore the stipulation is binding. However, even if it had done so, it would have been error to relieve the government, after the trial, of its stipulation that Gyro purchased the improved real property and its agreement that such fact was admitted and required no proof by appellant.

III

Since Neither The Evidence Nor Procedure Below Nor Law Permit The Trial Court To Modify The Stipulation That Gyro Purchased The Real Property, It Erred In First Finding That Gyro Purchased Said Property And Then Concluding It Did Not

In Finding of Fact No. 2 the trial court found as follows:

"The Court accepts and finds specifically the facts stipulated in Stipulation of Facts No. 1 and Stipulation of Facts No. II (both stipulations as modified in minor detail at trial and noted by the Clerk and as interpreted herein), and the pretrial order, and incorporates said stipulations and pretrial order herein by reference to the extent same are relevant to any issue herein."

Since the previously discussed "interpretation" of the stipulation that Gyro did not purchase the real property is error it follows that the trial court has found above, by adopting the stipulated facts, that Gyro purchased the improved real property. Therefore, its conclusion of law that Gyro did not purchase the

said property but received same as a contribution to capital is contradicted by its specific findings and is in error. An ultimate finding which is contrary to the evidence is erroneous.

IV

Commissioner v. Brown, 380 U. S. 563 (1965) Requires
A Reversal Of The Trial Court Finding That There Was
No Sale Of Real Property From Chris And Natalie Mowry
To Gyro.

The case of Commissioner v. Brown, 380 U. S. 563 (1965), was, as the opinion stated at page 566, one of the many in the course of which the Commissioner of Internal Revenue questioned whether there had been a sale within the meaning of the Internal Revenue Code. In fact, when the Commissioner petitioned for a writ of certiorari, after this Court had held there was a sale, he told the Supreme Court therein that it was one of the most important tax cases that had ever come to the Court, that "there now exists among the lower courts no core of agreement even as to the most generalized concept of what a sale meant", and that the Supreme Court should tell the lower courts what the word "sale" meant as used in the Internal Revenue Code (Tr. 639-640). The Supreme Court took the case.

In the briefs filed by the parties, it was pointed out to the Supreme Court that the approach the Commissioner was attempting by giving the word "sale" a different meaning in federal tax law than its ordinary meaning, was affecting a multitude of transactions and had a host of adverse effects because the word "sale" appeared over 600 times in subchapter A alone.



The facts in Commissioner v. Brown, supra, were that the stockholders of Clay Brown & Co. agreed to sell their stock to the Institute for \$1,300,000 payable \$5,000 down from the very assets of Clay Brown & Co. and the balance from the earnings of the company's assets. It was agreed that simultaneously with the transfer of the stock, the Institute would liquidate Clay Brown & Co. and lease its assets to a new corporation wholly owned by the attorneys for Clay Brown & Co. The new corporation would pay the Institute 80 percent of its operating profit of which 90 percent thereof would be paid by the Institute to the selling shareholders as payments on the purchase price of the stock. The Institute's note for \$1,300,000 to pay for the stock of Clay Brown & Co. was not only noninterest bearing but the Institute had no obligation to pay it except from the said rental income. The \$1,300,000 note was secured by mortgages and assignments of the assets transferred from Clay Brown & Co.'s liquidation to the new corporation. If the payments on the note failed to total \$250,000 over any two consecutive years, the sellers could declare the entire balance of the \$1,300,000 note signed by the Institute to be due and payable. Clay Brown was to have a management contract with the new corporation at an annual salary and the right to name any successor if he himself resigned. And Clay Brown's personal liability for some of the indebtedness of Clay Brown & Co., assumed by the new corporation, was continued. He also personally guaranteed some additional indebtedness incurred by the new corporation. See footnote 3.

On the day the sale transaction was closed, the new corporation immediately took over operation of the business under its

lease, on the same premises and with practically the same person-
nel which had been employed by Clay Brown & Co. Within four and
one-half years the new corporation suffered financial reverses
and its operations were terminated, but the sellers of the Clay
Brown & Co. stock did not repossess the assets under the mortgage
but agreed they could be sold by the Institute with the latter
retaining 10 percent of the proceeds. The payments on the
\$1,300,000 note from rentals paid by the Institute plus the sale
proceeds totaled \$936,131.85.

The Supreme Court then responded to the Commissioner's pe-
tition that it tell the lower courts what the word "sale" meant
as used in the Internal Revenue Code.

First, it noted, at page 570, the Commissioner's argument:

"Whatever substance the transaction might have had,
however, the Commissioner claims that it did not have
the substance of a sale within the meaning of § 1222 (3).
His argument is that since the Institute invested nothing,
assumed no independent liability for the purchase price
and promised only to pay over a percentage of the earn-
ings of the company, the entire risk of the transaction
remained on the sellers. Apparently, to qualify as a
sale, a transfer of property for money or the promise of
money must be to a financially responsible buyer who
undertakes to pay the purchase price other than from
the earnings or the assets themselves or there must be
a substantial down payment which shifts at least part
of the risk to the buyer and furnishes some cushion
against loss to the seller." (Underscoring supplied).

Next, the Supreme Court rejected the above argument, and gave its reasons:

" . . . This argument has rationality but it places an unwarranted construction on the term 'sale', is contrary to the policy of the capital gains provisions of the Internal Revenue Code, and has no support in the cases. We reject it."

Immediately thereafter, the Supreme Court told the lower courts what the word "sale" meant as used in the Internal Revenue Code. It held:

"'Capital gain' and 'capital asset' are creatures of the tax law and the Court has been inclined to give these terms a narrow, rather than a broad construction. *Corn Products Co. v. Commissioner*, 350 U. S. 46, 52. A 'sale', however, is a common event in the non-tax world; and since it is used in the Code without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code. 'Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently.' *Helvering v. Flaccus Leather Co.*, 313 U. S. 247, 249; *Hanover Bank v. Commissioner*, 369 U. S. 672, 687; *Commissioner v. Korell*, 339 U. S. 619, 627-628; *Crane v. Commissioner*, 331 U. S. 1, 6; *Lang v. Commissioner*, 289 U. S. 109, 111; *Old Colony R. Co. v. Commissioner*, 284

"'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent,' Iowa v. McFarland, 110 U. S. 471, 478; it is a contract to pass rights of property for money,-- which the buyer pays or promises to pay to the seller . . . ,' Williamson v. Berry, 8 How. 495, 544. Compare the definition of 'sale' in § 1 (2) of the Uniform Commercial Code. The transaction which occurred in this case was obviously a transfer of property for a fixed price payable in money." (Underscoring supplied).

Thus, the Supreme Court flatly rejected the government's argument that the term "sale" as used in the Internal Revenue Code is to receive some special interpretation reserved only for federal tax law,⁴⁶ and ruled that the term "sale" is to be given

⁴⁶ Compare the rule laid down by the Supreme Court with the following arguments made by the government to the trial court herein:

"We feel that state law determines the ownership of property. Under state law there is a corporation. There was a valid transfer to that corporation.

"So that all we are saying is that for tax purposes that corporation is not entitled to the stepped-up basis which it claims. That is all we are saying." (Tr. 711)

"Tax law sometimes becomes--must become, by virtue of the special concepts used--somewhat separate from the state law consequence.

"We are construing a highly abstract and particularized statute. That is all we are doing here.

"Was this a sale within the terms of the Internal Revenue Code - not whether this is a sale otherwise." (Tr. 715)

"It should go without saying that the legal ramifications of a transaction for federal tax purposes are not necessarily the same for State corporation or property law purposes." (R. 500)

its ordinary meaning--a transfer of property for a fixed price in money or its equivalent.

Applying here the Supreme Court's definition of "sale" as a transfer of property for a fixed price in money or its equivalent, it follows that there was a sale by the Mowrys and a purchase by Gyro.

At paragraph 13 of Stipulation of Facts No. 1 (R. 50), adopted as a finding of fact by the trial court (R. 707), it is set forth that:

"On January 1, 1959, Chris Mowry and Natalie Mowry conveyed by a Grant Deed three (3) parcels of improved real property known and referred to respectively as (1) 'The Tropics', (2) 'The Carousel' and (3) the 'Orange Grove Circle Apartments.'"

Also, the government conceded that there "was a valid transfer to" Gyro. (Tr. 711). Thus, there is no debate about the fact that there was a transfer of property to Gyro

Similarly, paragraph 10 of Stipulation of Facts No. 1 (R. 50), also adopted as a finding of fact (R. 707), recites that on January 1, 1959, Chris and Natalie entered into a written Sales and Purchase Agreement with Gyro, a copy of which is Exhibit 4 (R. 50, 71). That agreement provides that the fixed price to be paid by Gyro for said property was \$3,164,000. (R. 71)

Since there was a transfer of property from Chris and Natalie Mowry to Gyro for a fixed price in money, there was a sale within the definition of that term as handed down by the Supreme Court. Commissioner v. Brown, supra.

Because the Supreme Court was asked to tell the lower court what the word "sale" meant as used in the Internal Revenue Code,



and in fact did so in Commissioner v. Brown, supra, the definition thereof handed down cannot be dismissed simply by arguing that the transaction in Brown was different than the transaction in another case. The facts of each case naturally differ but the meaning given to the word "sale" in Commissioner v. Brown, supra, does not change until the Supreme Court changes it. Surely one of most important tax cases ever to come before the Supreme Court cannot, once it has been lost by the government, be so relegated to the status of an ad hoc decision limited to the facts of that case.

Thus, the trial court below erred in concluding that Brown is "distinguishable" because the transaction there "was negotiated only after considerable good faith bargaining at arm's length" whereas here "Chris Mowry effectively dealt only with himself." (R. 746). How does such a "distinction" change the fact that the Supreme Court decided in Commissioner v. Brown, supra, what the word "sale" meant as used in the Internal Revenue Code, and that it means a transfer of property for a fixed sum of money? In the first place, the language quoted by the trial court from Commissioner v. Brown, supra, was from that part of the Supreme Court's opinion which recited what the Tax Court had found below. There is nothing in the Supreme Court's opinion which holds that a sale is a transfer of property for a fixed amount of money only where there has been considerable good faith bargaining at arm's length between the seller and buyer. Presumably this would mean that there can never be a sale between anyone owning more than 50 per centum and up to 80 per centum of a corporation's stock since such seller would also be dealing

with himself according to the government's reasoning, and therefore there cannot be a capital gain sale of depreciable assets to a corporation whether or not the seller owns less than 80 per centum of its stock. In short, the government "reasoning" neatly defeats the decision of Congress in Section 1239 that capital gain would only be disallowed if the seller of such assets owned 80 per centum or more of the controlled corporation's stock.

What the Supreme Court did say in Commissioner v. Brown, supra, with respect to limiting the word "sale" was that the courts have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results. . . or would thwart the obvious purpose of the statute." 380 U. S. 571. But how can it be said that the usual meaning of "sale" would thwart the obvious purpose of the statute when, as shown above in I, the obvious purpose of the statute was to permit the acquiring controlled corporation to obtain a stepped-up basis whether or not the sellers owned 80 per centum or more of its stock. If the sellers owned 80 per centum or more, the sellers were not entitled to capital gain, but the controlled corporation purchaser still obtained a new stepped-up basis. If the sellers owned less than 80 per centum of the controlled corporation purchaser, the sellers received capital gain, and the controlled corporation purchaser also obtained the new stepped-up basis. That is, the obvious purpose of the statute could not be thwarted here by giving "sale" its usual meaning because the obvious purpose of the statute is that the controlled corporation purchaser is to receive a new stepped-up basis regardless of whether the seller is denied

capital gain treatment under Section 1239 or not.

While it is doubtful that the Supreme Court opinion would support the holding that an absurd result would be reached or the policy of Congress defeated if the purchase price was not within a reasonable range of the fair market value of the property sold,⁴⁷

⁴⁷The Commissioner's contention that the purchase price was excessive in *Brown v. Commissioner*, supra, was a part of his risk-shifting argument, all of which was rejected at pages 574-575 of the opinion. He had contended that if the seller continues to bear all of the risk and the buyer none, the seller must be collecting a price for his risk-bearing in the form of an interest in future earnings over and above what would be a fair market value of the property. Thus, he said, since the seller bears the risk, the so-called purchase price must be excessive and must be simply a device to collect future earnings at capital gains rates. 380 U. S. 573.

It is true that the Supreme Court went on to point out that the price paid therein was within a reasonable range of the fair market value of the property, 380 U. S. 569, 574, but it also followed shortly with the ruling that:

"Furthermore, risk-shifting of the kind insisted on by the Commissioner has not heretofore been considered an essential ingredient of a sale for tax purposes." 380 U. S. 574.

Therefore, it is extremely doubtful that the Supreme Court ruled that an absurd result would be reached or the policy of Congress defeated if the purchase price paid was not within a reasonable range of the fair market value.

The above conclusion is buttressed by the concurring opinion of Mr. Justice Harlan who pointed out the incongruity of the Commissioner's all or nothing approach suggesting that:

"The force underlying the Government's position is that the respondents did clearly retain some risk-bearing interest in the business. Instead of leaping from this premise to the conclusion that there was no sale or exchange, the Government might more profitably have broken the transaction into components and attempted to distinguish between the interest which respondents retained and the interest which they exchanged. . . ."

That is, Mr. Justice Harlan also refused to limit the word "sale", but suggested to the government that in examining the seller's tax consequences, it might be wise not to continue with the questionable logic of concluding there is no sale if a seller retains some risk-bearing interest in the asset sold, recognize that a sale occurred, and place a value on that part of the price, if any, which exceeds the fair market value, and tax that portion to the seller as ordinary income.

and therefore the usual definition of a sale as a transfer of property for a fixed amount of money need not be applied, such a holding would not adversely affect the taxpayer herein. The reasons are found in the record and findings herein.

The Court may have noticed that while appellant orally argued and briefed its view that the sale price of \$3,164,000 was within a reasonable range of the fair market value of the real property on January 1, 1959 (Tr. 646; R. 348, 623), there is no finding of fact that such price was not within "a reasonable range" of the fair market value. Nor is there a finding that the price was grossly excessive or twice the fair market value. 380 U. S. 574 at footnote 7. Instead, there is the evasively worded Finding of Fact No. 47 that:

"Both plaintiff and defendant presented expert evidence on the fair market value of the properties at the time of the transfer. While this evidence is in part conflicting, after careful consideration the Court is inclined to the view that the recited 'price' was some-what excessive in relation to fair market value."
(R. 726).

This finding is subject to fatal defects.

First, the Court is asked to note that the trial court does not find as fact that the purchase price was somewhat excessive. It simply finds as fact that it (the trial court) is "inclined to the view" that it was "somewhat" excessive. Second, even if it were a finding that the price was "somewhat" excessive, such a finding is not the equivalent of a finding that the purchase price was not within a reasonable range of the fair market value.

And what does somewhat excessive mean? Excessive by \$1 or \$1,000,000?

There are good reasons in the record why the above finding was worded by the government in such meaningless fashion. They are:

(1) The government's "expert" testified on cross-examination that he himself would have bought the real property for \$3,164,000. (Tr. 601-602, 604).

(2) The trial court rejected a summary of Mr. Halstead's testimony as evidence (Tr. 609) after hearing him testify he would buy the property for \$3,164,000, while admitting such a summary from Gyro's qualified expert, Mr. John Vaughn. (Tr. 93).

(3) The government's "expert" was not an expert at all but a U. S. Internal Revenue Agent who was not a member of the Appraisal Institute.

(4) The government's "expert" was not an expert at all (Tr. 548-549) but a U. S. Internal Revenue Agent (an employee of the Commissioner and therefore a biased witness).

(5) The main purpose for which the testimony of the government's "expert" was offered was not with respect to fair market value, but as an "expert" on sham transactions. (Tr. 542).

(6) Gyro's expert on fair market value, Mr. John Vaughn, of the nationally known Los Angeles based firm of Marshal & Stevens, Inc., who has been hired many times to testify as an expert on valuation by the Commissioner of Internal Revenue and the Department of Justice in tax cases, and who had made between 500 and 700 appraisals of real property since 1936, and who had appraised between 10,000 and 12,000 apartments on 21 housing projects

(Tr. 46-55) valued the improved real property herein at \$2,985,000 on January 1, 1959 on the basis of a cash sale (Exhibit 1; Tr. 77, 86, 90-91, 105-106).

(7) When the government attached as Appendix L to its post trial brief a copy of the summary of the testimony of the government's "expert" on fair market value which had been rejected as proper evidence, the trial court, upon motion of Gyro, struck the Appendix from said brief and ordered the Clerk to return it. (R. 542-543, 633).

The foregoing shows why the government did not submit a finding that the purchase price of \$3,164,000 was not within a reasonable range of the fair market value on January 1, 1959. Such a finding would be clearly erroneous. And since the said finding which was made is not a finding, not sufficient to support a conclusion that the purchase price of \$3,164,000 was not within a reasonable range of the fair market value, and not supported by the record, it follows that the government cannot avoid Commissioner v. Brown, supra, on the ground that here there was a purchase price which was not within a reasonable range of the fair market value.

V

The Government Abandoned Its Sham Argument Prior
To Trial And The Trial Court Therefore Erred In
Finding The Transfer Was A Sham

The Supreme Court in Commissioner v. Brown, 380 U. S. 563 (1965) stated, at page 569, that:

"Having abandoned in the Court of Appeals the argument that this transaction was a sham, the Commissioner now admits that there was real substance in what occurred between the Institute and the Brown family. The transaction was a sale under local law."

Conversely, once the Commissioner concedes there was a sale under local law, he has abandoned his argument that the transaction was a sham. Here the government conceded in its pretrial memorandum that "defendant recognizes the validity of the transfer to Gyro Engineering Corporation under California law." (R. 241). Hence, since it conceded the transfer was a sale under California law, it in effect abandoned the contention that the transfer was a sham. Appellant realizes that the government herein tried to combine the two by saying the transfer was a sale under California law but nevertheless was a sham under federal tax law. What appellant wishes to emphasize is that both the Supreme Court and the Commissioner, in Commissioner v. Brown, supra, recognized clearly that the sham argument was of necessity abandoned once it was conceded that the transaction was a sale under California law.

VI

The Trial Court Erred In Ruling The Transfer From The Mowrys To Gyro Was A Sham And Then Ruling That There Was A Transfer Which Was A Capital Contribution

The trial court's basic ruling below was made on March 22, 1967 after the filing of briefs. (R. 634). It was that:

"The transfer from the Mowrys to Gyro of the

apartment houses was a sham, without substance, and there-fore for income tax purposes was merely a contribution to the capital of Gyro."

That is, the trial court first ruled there was no transfer because the purported transfer was a sham, and "therefore" was a contribution to Gyro's capital. But if there was no transfer to Gyro because the purported transfer was a sham, how could there be a transfer which constituted a capital contribution?

In Commissioner v. Brown, supra, it made some sense for the Commissioner to assert deficiencies against the "sellers", contend that the transfer to the Institute was a sham, and that therefore the "sellers" were still receiving the profits from Clay Brown & Co. However, here the Commissioner asks the Court to hold with respect to the "buyers" (the Institute in Brown), that the transfer was a sham but nevertheless really occurred because there was a capital contribution to Gyro. Would the Supreme Court have ever ruled in Commissioner v. Brown, supra, that the transfer or sale to the Institute was a sham requiring the sellers to pay ordinary income tax on the profits from Clay Brown & Co.'s assets, and at the same time rule that the Institute also was required to pay income tax on those same profits if Congress had imposed a 20 per cent tax on an exempt organization's profits?

What has happened here is that the Commissioner and the trial court are trying to have it both ways at once. If the transfer was a sham for federal tax purposes, then Gyro cannot, for federal tax purposes, be treated as having the income from the apartments.

The Trial Court Made No Finding That Chris And Natalie Mowry Intended To Make A Capital Contribution Nor Would The Record Support Such A Finding, And Hence The Conclusion That They Made A Contribution To Capital Is Erroneous.

During the trial the government placed into evidence the testimony of the author of the notice of deficiency herein to prove that the basis of its case was that Gyro had received the apartments not as a result of a sale but as a contribution to capital under Section 362 (a) (2). (Tr. 213). Thereafter, in the critical Conclusion of Law No. XLII, the trial court cited Section 362 as its authority for its conclusion that Gyro's cost basis is limited to the cost basis of Chris and Natalie Mowry. (R. 747).

Section 362 (a) provides as follows:

"(a) Property Acquired by Issuance of Stock or As Paid-In Surplus. - If property was acquired on or after June 22, 1954, by a corporation -

(1) in connection with a transaction to which section 351 (relating to transfer of property to corporation controlled by transferor) applies, or

(2) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of

gain recognized to the transferor on such transfer."

Since the trial court expressly refused to make a ruling that Section 351 applied (R. 747), probably because it applies only if the transferors own at least 80 per centum of all classes of stock of the acquiring corporation's stock (Sections 351 (a) and 368 (c)) whereas here the government had stipulated that Chris Mowry's adult brother William had owned 25 per centum at the date of transfer (R. 48-49), it is plain that the trial court had to invoke Section 362 (a) (2) particularly since it is the only section dealing with cost basis of a capital contribution.

However, there are several reasons why Section 362 (a) (2) cannot be applied here.

First, there cannot be a capital contribution because as shown heretofore, there was a transfer of property for a fixed amount of money, and hence a sale. There being a sale, the transfer cannot be a capital contribution. Also, for the other reasons set forth heretofore, there was a sale by Chris and Natalie Mowry to Gyro, and therefore no capital contribution.

Second, there cannot be a capital contribution because there was no finding by the trial court that it was the intention of Chris and Natalie Mowry to make a capital contribution. Whether that intent may be determined from objective data or only from the subjective intent of Chris and Natalie Mowry, the fact remains that the trial court made no finding that such was their intention. In Conclusion of Law No. IV, the trial court engages in a general discussion of the requisite intent, and states that whether Chris and Natalie Mowry made a capital contribution involves "objective intent." Yet the conclusion does not state

that such was their intent nor does any other. The reason is that the record here would not support such a finding.

The definition of a capital contribution is just as simple as it sounds. It is a contribution or gift or donation to the capital of a corporation. Thus, the Accountants Handbook, 4th Ed., edited by Wixon, at 21.24, states in discussing the sources of a corporation's capital that:

"Both tangible and intangible property may be donated to the corporation by either stockholders or outsiders. . . Newlove and Garner (Advanced Accounting) indicate that gifts to the corporation by stockholders should be classified as paid-in capital, . . ."

That is, a contribution to capital is a gift or donation to the corporation's capital structure against which the donor has no claim.

Here Chris and Natalie Mowry owned apartment house at the beginning of January 1, 1959 against which there was mortgage indebtedness of \$791,638.50 (R. 86, Tr. 42) and which had a fair market value of \$3,164,000. Thus, they had an equity of \$2,372,361.50 in the said apartments. On that day they owned 55 per centum of Gyro's stock while one adopted child owned 10 per centum, one natural child owned 10 per centum, and Chris Mowry's 32 year-old brother owned 25 per centum. Thus, a finding that Chris and Natalie Mowry made a capital contribution to Gyro of that \$2,372,361.50 necessarily comprehends a finding that Chris and Natalie Mowry intended to make a gift of 25 per centum thereof or \$593,090.37 to Chris' adult brother, William. It also must comprehend a finding that Chris and Natalie Mowry intended to

make a gift of 20 per centum thereof, or \$474,490.30, to two of their children. The reason of course is that their only claim against such "capital contribution" of \$2,372,361.50 would be 55 per centum while William and their two children would be entitled to 45 per centum. Not only is it the uncontradicted testimony of Chris Mowry that he did not intend to make gifts totalling \$1,067,580.67 to his adult brother and two of the children (Tr. 335-336, 331-333), but viewed from an objective sense there is no rationality to such a finding.

To begin with, William Mowry was a man of financial substance who owned ranches and business interests in Mexico. (Tr. 335). Next, what mother (Natalie Mowry) of one natural and one adopted child, who was then planning to and did adopt more children (Tr. 332), would intend a gift of \$593,090.37 to her husband's financially able adult brother, William, especially when such a gift was not only at her own expense to the extent of one-half or \$296,545.18 but also at the expense of the two children she then had and those which she intended to and did in fact adopt in the future. (Tr. 331-332). Also, in view of the then intention of Chris and Natalie Mowry to adopt more children and their policy of making equal gifts to each, the court's conclusion that they intended to make a capital contribution of their \$2,372,361.50 equity in the apartments to Gyro is totally unreal because it forces them against their intention to make a gift of \$474,490.30 to two children and leaves them with insufficient equity to make equal gifts to the children they adopted subsequently. (Tr. 442).

When The Commissioner Departs From The Grounds Relied On In His Notice Of Deficiency To Sustain A Theory Later Raised, He Has The Burden Of Proving Any New Matter Raised, And Hence, Where As Here, He Has Not Done So, The Taypayer Prevails.

The applicable rule of law, according to 10 Mertens, Law of Federal Income Taxation, § 58 A. 35, at page 98, is that:

" . . . when the Commissioner departs from the grounds relied on in his statutory deficiency notice to sustain a theory later raised, he has the burden of proving any new matter raised."

Cases so holding are Massingale v. U. S., 59-1 U. S. T. C. Par. 9298 (D. C. Ariz. 1959) and Service Life Ins. Co. v. U. S., 189 F. Supp. 282 (D. C. Neb., 1960), aff'd. 8 Cir., 1961, 293 F. 2d 72.

In this case the notice of deficiency stated only that depreciation was disallowed in the respective amounts of \$83,932.52 for 1959 and \$100,775.97 for 1960. (R. 105-106). The Commissioner's agent who prepared the notice of deficiency conceded that the statutory notices do not mention the theory of law under Section 362 (a) (2). (Tr. 168-169). He further conceded that any written reference to the basis of the deficiency being a capital contribution under Section 362 (a) (2) was in his statement supporting the notice which is never shown or mailed to taxpayers and was not presented to Gyro. (Tr. 211, 216).

Since the 30 Day letter issued to Gyro prior to the notice

of deficiency stated that all of the income and expenses from the said apartments was being assigned to Chris and Natalie Mowry and that Gyro did not own or possess the apartments (R. 98-99, Tr. 147-148), Gyro took the deposition of the author of the notice of deficiency to find out what was the basis thereof. At that deposition proceeding on October 15, 1965, said author was asked-- and was instructed by the government counsel who tried this case to answer yes or no--the following question:

"Q. As to those items on Exhibit A (attached to the Notice of Deficiency on which the old Mowry basis was used, Mr. Nisbet, when you said that the basis of the Mowrys was used, the item being the basis of the transferors, was the disallowance on the ground that the transfer into the corporation was a nontaxable exchange.

* * *

The Witness. Yes, nontaxable exchange" (R.134).

Because a nontaxable exchange between a transferor and a corporation is provided for in Section 351 and is a term of art well known among tax practitioners as describing Section 351, there is no doubt that the Commissioner's stated position to that point in time was that the basis to Gyro was determined under Section 362 (a) (1) as the basis of Chris and Natalie Mowry because it was acquired in connection with a transaction to which Section 351 applied rather than as a contribution to capital described in Section 362 (a) (2).

Thereafter, on May 11, 1966, the government filed Stipulation of Facts No. 1 providing in paragraph 10 that "Gyro

"the three apartment developments". (R. 46, 50).

Thus, the Commissioner departed from the grounds relied on in his statutory notice of deficiency: (1) because there were no grounds set forth therein and any theory adopted would be a departure; (2) because the 30 Day letter, admissible to explain the basis of a deficiency notice, adopted the theory that the income from the real property was not Gyro's; (3) because the author of the notice explained the theory as being based on there having been a nontaxable exchange rather than a contribution or donation to capital.

Having so departed from the grounds relied on in his notice of deficiency to sustain the theory later raised by him in the pretrial order filed June 20, 1966 that there was no purchase but a capital contribution to Gyro, the burden of proving there was no sale was on the Commissioner. For the reasons set forth in this brief, and particularly because the Commissioner stipulated there was a purchase, he has failed to carry that burden. The trial court erred in denying Gyro's pretrial motion for a ruling that such burden was placed on the Commissioner. (R. 133-139, 150, Tr. 39).

IX

The Government's Defense, Set Forth In The Pretrial
Order Of June 20, 1966, That There Was No Sale But
A Contribution To Gyro's Capital Was Barred By The
Statute Of Limitations

The returns for 1959 and 1960 were filed by Gyro more than five years prior to the date of June 20, 1966 when the pretrial order was filed in which the government first claimed in writing that there was no sale to Gyro on January 1, 1959 but a contribution to capital. (R. 65, 70). The statute of limitations provided for in Section 6501 (a) has run on such defense. Hammond v. Maloney, 80 F. Supp. 212, 217 (D. C. Ore. 1948).

X

Many Of The Findings Of Fact Are Clearly Erroneous

A large number of the findings of fact submitted by the government and thereafter signed by the trial court are either without any support in the record or are flatly contradicted by the stipulations of fact and other evidence or are guilty of the sin of omission. The result is a false and grossly distorted statement of facts which is clearly erroneous as a whole and in its individual parts. For example:

Finding of Fact No. 8. (R. 709)

Here the statement or inference is made that there really was no capital paid into Gyro for the 10,000 shares of issued stock. This was accomplished by putting quotation marks around the words "paid-in" and by the content of the finding itself. Yet, in page 4 of Stipulation of Facts No. 2 at lines 9 through 15, material which was inserted in the stipulation at the government's request, it is set forth that Gyro had \$10,000 of paid-in capital. (R. 84). Also, in page 3 of Stipulation of Facts No. 1 at lines 15 through 19 and in page 4 thereof at lines 9 through

12, it is stated that "Chris and Natalie Mowry paid \$2,500 for the shares (2,500) issued April 20, 1953 and retained by Natalie Mowry," that "Twenty-five hundred dollars was also paid for the shares transferred from Chris Mowry to William Mowry," and that "William Mowry actually supplied the consideration of 25 per cent of the stock interest in Gyro Engineering Company" on April 20, 1953. (R. 48, 49).

Finding of Fact No. 10. (R. 4).

It was stipulated that Gyro's purpose in acquiring the Paloma Street property was investment. (R. 84). Therefore, can such a fact lead to a conclusion that Gyro engaged in no activities from 1953 to January 1, 1959, particularly when, as will be shown below, the evidence is to the contrary.

Finding of Fact No. 12. (R. 710).

This finding implies that Gyro never received the \$30,896.65 condemnation award from the Paloma Street property, but the evidence is that the check for \$30,896.65 was payable to Gyro, endorsed by Gyro to Chris and Natalie Mowry, and credited by them in payment of the \$30,000.00 down payment required by the terms of the January 1, 1959 sale of their real property to Gyro. (Tr. 426). Also, the government stipulated in page 5 of Stipulation of Facts No. 1 at lines 25 through 27 that:

"On March 30, 1959 Gyro Engineering Corporation paid \$30,896.65, the proceeds of the condemnation award it received that date, to Chris Mowry." (R. 50).

Finding of Fact No. 13. (R. 710)

Here the Sales and Purchase Agreement of January 1, 1959 is referred to as "purported" and is placed within quotation

marks ("sales and purchase agreement"), the sale price of \$3,164,000 referred to as "purported" and is placed within quotation marks ("sale price"), and the promissory notes referred to as "promissory notes." However, there is no statement in Stipulation of Facts No. 1 that it is a "purported" Sales and Purchase Agreement or that the promissory notes were purported. (R. 50). Nor does the said stipulation refer to a "sale price." This finding contradicts Paragraphs 10, 11, 17, 23 and 27 of Stipulation of Facts No. 1. (R. 50, 51, 53, 54).

Finding of Fact No. 16. (R. 712)

This finding states that the tax advantages resulting from a stepped-up cost basis to Gyro were compounded because the capital gain reported by Chris and Natalie Mowry was not taxable due to offsetting losses from a farming venture. Such a statement is both wrong and ludicrous. The capital gain tax is a maximum of 25 per cent. Thus, in order to eliminate \$15,000 of capital gain tax each year (1/4 of the \$60,000 in annual payments on the purchase price), Chris and Natalie Mowry would have to sustain economic losses of at least \$30,000 annually from the farming venture. There is no tax advantage in losing \$30,000 in order to eliminate \$15,000 of tax. Therefore, the tax advantages from the stepped-up basis were not compounded by the farming losses. No competent tax counsel advises a client to lose \$30,000 in order to eliminate \$15,000 of tax. No rational taxpayer loses \$30,000 merely to keep the government from collecting \$15,000.

Finding of Fact No. 18. (R. 713)

The finding states that the basis of the Commissioner's

notice of deficiency was "his determination that the transfer was not, for federal tax purposes, a bona fide sale," but a contribution to capital. As shown more fully in Point VIII, **this is** wrong. The Commissioner's agent who wrote the notice of deficiency testified that the notices of deficiency "do not mention the theory of law" under "Section 362 (a) (2) which is the whole basis of our disallowance" (Tr. 168-169), and that his written statement in support of the notice of deficiency in which the basis is set forth was not mailed to Gyro or to any taxpayer. (Tr. 216-217).

Finding of Fact No. 19. (R. 713)

The finding mistates appellant's contention that Commissioner v. Brown, supra, holds that a sale is a transfer of property for a fixed sum of money, and that here the government stipulated there was a transfer of property for a fixed sum of money.

Finding of Fact No. 20. (R. 713)

To find that outside of holding title to a piece of unimproved real property, Gyro had been substantially inactive as a corporation from 1953 to January 1, 1959 is unsupported. In Stipulation of Facts No. 2, at page 1, it is stated that Gyro "made Scorby test equipment and several test panels," and from "April 20, 1953 to 1955 checked into some parcels of real estate," and "purchased a parcel of land." (R. 80). Also, from the middle of April in 1953 until January 1, 1959, it worked on a number of different fields of scientific research including long range weather forecasting, how the eye sees color, and the unified field theory. (Tr. 239-240). Each investigation subsequently bore fruit, and Gyro has a patent pending covering three

dimensional color television, and makes accurate long range weather forecasts. (Tr. 239-240).

Finding of Fact No. 23. (R. 714)

It is wrong to state that Gyro had "little or no cash or working capital" on January 1, 1959 because prior thereto during 1958 it knew it was to receive approximately \$30,000 in cash from the Paloma Street condemnation award. (Tr. 421-422, 423-424). The \$30,000 cash down payment was paid by Gyro to Chris Mowry on March 30, 1959. (R. 50)

Finding of Fact No. 25. (R. 715)

The statement that Chris and Natalie Mowry "purported to sell property allegedly worth \$3,164,000" and the reference to the "alleged down payment of \$30,000" are clearly erroneous. The government stipulated that Gyro paid Chris Mowry \$30,896.65 on March 30, 1955. (R. 50). The other statements are erroneous for the reasons set forth above regarding Finding of Fact 13, and because there is no finding that the fair market value of the property on January 1, 1959 was not \$3,164,000.

Finding of Fact No. 28. (R. 716)

The finding that the notion of "payments" on money "notes" is "misleading" is clearly erroneous. Stipulation of Facts No. 2 at line 32 of page 8 and lines 1, 5 and 6 of page 9, states that:

"Payments of principal were to be made at the rate of \$60,000.00 per year. . . . The said \$60,000.00 annual payments were made through 1963 or a total of \$300,000.00." (R. 86-87).

Finding of Fact No. 29. (R. 718)

This finding to the effect that "the corporate identity of Gyro Engineering Corporation usually was ignored" is clearly erroneous in several of its specific parts and in its totality. Also, it is not relevant because it goes to support a conclusion disregarding the corporate entity and taxing the income from the apartments to Chris and Natalie Mowry (the approach taken in the 30 Day letter) whereas here the government has taxed the corporation.

The statements found at lines 8 through 12 of R. 718 are not based on evidence. The finding respecting leases subsequent to 1959 being in the name of Chris and Natalie Mowry is not complete since the old leases contained provisions automatically renewing the lease. (Tr. 515).

Finding of Fact No. 30. (R. 719)

The finding supports a conclusion that Gyro did not exist whereas the government stipulated that Gyro was not only an existent corporation during all years relevant here but was a "corporation recognizable for federal tax purposes." (Tr. 460-461).

Finding of Fact No. 31. (R. 720)

The finding that Gyro had no employees in any usual sense in the years in question is entirely misleading because the trial court allowed as deductions from gross income of Gyro \$22,554.48 for maintenance and \$21,003.08 for repairs during 1959 and \$52,477.34 for repairs and maintenance for 1960. (R. 65,68; Exhibits 2 and 3 attached to Stipulations of Facts No. 1; Tr. 375, 382, 389-391, 522-523; Exhibits 5 and 8). In addition there



were managers for each of the three apartments who were treated by Gyro as self-employed. Thus, it is misleading in the extreme simply to say, without amplification, that Gyro had no employees.

Finding of Fact No. 32. (R. 720)

The reference to the bills and expenditures of Gyro as "purported" is clearly erroneous since the trial court allowed Gyro as deductions from its gross income \$73,943.62 for repairs, maintenance, taxes, interest and losses for 1959, and \$131,235.18 for maintenance, gardening, painting, repairs, taxes and interest for 1960. There is no evidence in the record to support the finding that personal expenses of the Mowrys were charged to Gyro, and if there had been such evidence, the trial court could not have allowed, as it did, the full deduction for \$73,943.62 in 1959 and \$131,235.18 for 1960. What the trial court did here was disallow only the bulk of the depreciation deductions claimed by Gyro in 1959 and 1960 on the ground that Gyro received the property as a capital contribution and must take the cost basis of Chris and Natalie Mowry. However, to justify that ruling, it questions the fact and propriety of nearly \$200,000 worth of other deductions which in fact it allowed to Gyro.

Finding of Fact No. 33. (R. 720)

To find, on the one hand, that Gyro is entitled to nearly \$200,000 of deductions for 1959 and 1960, while on the other hand, finding that "no adequate segregation of the Mowry's personal expenses from the claimed expenses of Gyro was made" is clearly erroneous. Obviously the trial court was satisfied that the proof of the nearly \$200,000 in claimed expenses of Gyro,

offered in the form of thousands of checks and days of testimony, constituted an adequate segregation of any alleged Mowry personal expenses from Gyro's expenses.

Finding of Fact No. 34. (R. 721)

The finding is clearly erroneous since it supports only the conclusion that Gyro was in reality only Chris Mowry in disguise whereas the government stipulated that Gyro was recognized for federal tax purposes for all years relevant herein. (Tr. 460-461).

Finding of Fact No. 36. (R. 721)

The finding that Chris Mowry did not get the appraisals "in writing" which he testified were used in determining the sale price until after an Internal Revenue Service audit began in 1961 is grossly misleading and clearly erroneous. The only testimony on the point was from Chris Mowry who testified on cross examination that the sale price was determined in 1958 after consulting with several appraisers and real estate men in Pasadena among whom were one Bill Williamson, Jack Flynn, and a Mrs. Golet, an attorney, and that upon request of an Internal Revenue Agent in 1961, written appraisals were then obtained from Messrs. Williamson and Flynn, a long time before Mr. Nisbet wrote his secret report that it was the government's position that no sale had occurred. (Tr. 432-433). The statement that the deed recording the sale was not filed until March 17, 1961 whereas an Internal Revenue Service audit began in early 1961 is clearly erroneous because the first agent did not contact Gyro or Chris Mowry until May of 1961 (Tr. 345-346). The finding that Chris Mowry tried to "dress up" the transaction

considerably after the Internal Revenue Service audit began is therefore clearly erroneous, particularly since the Revenue Agent's 30 Day letter was not issued until November 30, 1962 and the Commissioner never revealed his "no sale" argument until years later.

Finding of Fact No. 37. (R. 722)

The finding that "no evidence was presented to show how Gyro treated the January 1, 1959 transaction" on "its books and financial statements" nor "books of account or financial statements of Gyro" presented to the court is clearly erroneous. The reasons are that the government stipulated over and over that there was a valid transfer to Gyro, that Gyro owned the real property, that Gyro was recognized for federal tax purposes, that payments of \$300,000 were made on the purchase price, that Gyro purchased the apartments and that Gyro need not produce evidence to prove the stipulated facts.

Finding of Fact No. 39. (R. 722)

This finding, a summary of earlier findings, is clearly erroneous for the reasons set forth with respect to each finding upon which it is based. Furthermore, it is not a finding but is qualified by the word "apparently."

Finding of Fact No. 40. (R. 723)

Stating that the sale was purported and "in no sense a bargained or arm's length transaction" is clearly erroneous because it is based solely on the premise that Chris Mowry in effect dealt only with himself. This premise is based not on evidence or fact concerning the sale on January 1, 1959 but on the government's contention that Gyro was "wholly owned" by

Chris Mowry (Tr. 720), that "when a controlling stockholder deals with his corporation" there "is almost a presumption-- an inference--that you don't have what is called an arm's length transaction" (Tr. 709). First, Gyro was not wholly owned by Chris and Natalie Mowry. They owned 55 per centum of its stock while their minor children owned 20 per centum and Chris' adult brother William owned 25 per centum. Second, if there is a presumption that a transfer between a controlling stockholder owning 55 per centum or 75 per centum of the stock cannot result in an arm's length transaction, thereby negating a sale according to the government's lights, why did Congress allow any stockholder owning 79 per centum to obtain long term capital gain on a sale of depreciable assets to his corporation? Section 1239. This finding is a legal conclusion and an erroneous legal conclusion.

Finding of Fact No. 41. (R. 723-724)

The finding is clearly erroneous because the tax consideration was only one of the aspects of the January 1, 1959 sale which Chris Mowry considered as the trial court itself stated. (Tr. 479). The other reasons were to get the apartments out of his individual name, to avoid problems at Chris Mowry's death since he had had a heart attack, to obtain the management of his brother who already owned 25 per cent of the stock, to avoid dissolution of the apartment house in case of Chris Mowry's death, to ease the program of making gifts to his children, and because Chris Mowry wished to exercise his right to enjoy the benefits of capital gain in selling his property. (Tr. 333-335).

Finding of Fact No. 42. (R. 724)

To find that "there is warrant for an inference that the transaction was principally tax motivated, and indeed that generation of a stepped up basis for depreciation and other tax savings devices was its *raison d'etre*" is not a finding. To say that there is warrant for an inference is not the equivalent of finding as fact that the transaction was principally tax motivated. However, assuming it is a finding, the material above on Finding of Fact No. 41 shows that such a finding would be clearly erroneous.

Finding of Fact No. 43. (R. 724)

The finding that the \$3,164,000 of apartments "were essential for the conduct of corporate business" of Gyro in the sense that it was the only way it could go into "business" as a regular activity for profit is clearly erroneous. Gyro had, prior to the sale on January 1, 1959, \$10,000 of paid in capital and knew during 1958 that it was going to receive approximately \$30,000 from a condemnation award.

Also, it had engaged in business from 1952 to January 1, 1959 when it made Scorby test equipment and **test** panels (R. 80-81), attempted to obtain Army and Navy contracts (R. 80-81), investigated and purchased real estate (R. 80), did work on long range weather forecasting, and worked on how the eye sees color. (Tr. 239-240).

Finding of Fact No. 44. (R. 725)

This is not a finding of fact, and if so, it is clearly erroneous. All the trial court is doing is wondering about the practical effect of payments "on notes" which "might have been

made or not made." The government stipulated in Stipulation of Facts No. 2 at paragraph 16, and the trial court adopted it as fact, that:

"Payments on the principal were to be made at the rate of \$60,000.00 per year. . . . The said annual payments were made through 1963 or a total of \$300,000.00."

(R. 86-87).

Finding of Fact No. 45. (R. 725)

The finding that Chris Mowry testified "with reservations" that he would subordinate his indebtedness if additional financing were to be obtained by Gyro is clearly erroneous and is illustrative of the numerous gross errors involved herein. Chris Mowry first testified that there was about \$2,000,000 still due him and Natalie Mowry on the \$3,164,000 sale price (Tr. 344), that he had recently obtained mortgage loan commitments on the three apartments of \$1,800,000 (Tr. 337-388), and then the trial court asked if in his negotiations on such loan commitments he and Natalie Mowry would have to subordinate their indebtedness and whether that was agreeable to Chris and Natalie Mowry (Tr. 345); the full answer was:

"Provided that we got paid the proceeds of the loan. Otherwise, no." (Tr. 345).

In short, the phrase "with reservations" in this finding means that Chris Mowry testified he would subordinate the \$2,000,000 indebtedness owed to him and Natalie Mowry only if the \$1,800,000 loan proceeds were paid to them on the \$2,000,000.

Since the bulk of businessmen represented by most lawyers would discount a \$2,000,000 long term debt for \$1,800,000 today,

it is obvious that subordinating to the extent of \$200,000 in order to get \$1,800,000 in cash is not subordination at all.

Finding of Fact No. 46. (R. 725)

It is clearly erroneous to find that Gyro's paid in capital and capital surplus on January 1, 1959 was \$10,000 and then conclude that the debt to equity ratio is 316.4 to 1 in view of indebtedness represented by the purchase price of the apartment. Since Gyro knew in 1958 it was **going** to receive the approximately \$30,000.00 condemnation award, the gain therefrom or \$23,096.65 was a receivable which increased Gyro's capital and capital surplus to \$33,096.65 on January 1, 1959. The debt to equity ratio is therefore \$3,164,000 to \$33,096.65 or 90 to 1.

Finding of Fact No. 47. (R. 726)

That this finding is clearly erroneous has been shown at page 40, supra; there is no finding of fact and no substantial evidence to support it if it is.

Finding of Fact No. 48. (R. 726)

It is clearly erroneous to find that there was "little or no business purpose for the transaction" in view of the evidence set forth above under Finding of Fact No. 41.

Finding of Fact No. 49. (R. 726)

The finding states that the "character" of the transaction "seems unrealistic and uneconomic" because it appears highly dubious that hypothetical typical average investors "would have entered into the transaction had it been negotiated at arm's length between unrelated parties." This is not only clearly erroneous, but it is fantastic in view of the testimony by the government's "expert" that he would buy the real property for

\$3,164,000 on the terms of this sale (Tr. 601-602), and his agreement with the trial court's statement that this type of transaction actually benefits the seller financially (Tr. 605-606). It was after that point that the trial court rejected the summary of the government "expert's" testimony (Tr. 609). In short, the government prepared for signature and the trial court signed a finding of fact which is actually contradicted by the government's "expert" and the trial court itself. It is also clearly erroneous to find that no credible evidence was introduced by Gyro that "outside investors" would have entered into this transaction in view of the Marshall & Stevens testimony that the value was \$2,985,000 on a cash sale and the above statements by the government's "expert" on sham transactions.

Finding of Fact No. 50. (R. 726)

The finding that Chris Mowry's testimony concerning his reasons for selling the properties is "somewhat" unconvincing in light of the fact he continued to perform the same management duties as before is clearly erroneous. Of the five reasons set forth above under Finding of Fact No. 41, only one referred to management problems, and therefore rejection of his testimony on the ground that he continued to manage the apartments is erroneous. Furthermore, a finding that his testimony is "somewhat unconvincing" is not a finding that his testimony as to the other reasons is unbelievable or false.

Finding of Fact No. 51. (R. 727)

Finding that the proceeds of the \$30,896.65 condemnation award "presumably" remained available to Gyro is clearly erroneous because it contradicts Stipulation of Facts No. 1 which

states at paragraph 12:

"On March 30, 1959 Gyro Engineering Corporation paid \$30,896.65, the proceeds of the condemnation award it received that date, to Chris Mowry." (R. 50)

Finding of Fact No. 52. (R. 727)

The finding that "there is little reason to suppose" that the \$30,896.65 condemnation award proceeds were not used by Gyro to pay its bills is not a finding of fact, and if so is clearly erroneous for the reason set forth above under Finding of Fact No. 51.

Finding of Fact No. 53. (R. 727)

The finding that the parties did not stipulate that Gyro purchased the apartments is clearly erroneous for the reasons set forth in Point II, *supra*.

Finding of Fact No. 54. (R. 727)

The finding that the government has, since this case was in its administrative stages, taken the position that the transfer was not a sale is clearly erroneous for the reasons set forth in Point VIII, *supra*.

XI

The Trial Court Misinterpreted And Misapplied The
Law Even Assuming Commissioner v. Brown, Supra,
Were Not Applicable

Aside from the fact that the trial court's conclusions of law are based on findings of fact which are clearly erroneous, the conclusions are also fatally flawed because of the method by which they were constructed.

Instead of posing the precise question--was there a sale or a contribution to capital--and then turning to those cases which had set down the criteria to be used to answer that question, the conclusions submitted by the government adopt the familiar technique of finding several cases which deal with one-half of the above question or an entirely different question, extracting one or two of the several criteria applied therein and using it to construct a list of criteria which hopefully fit the facts of this case. Thus, one can prove that black is white, democracy is communism, and men are women.

For example, although the dicta in O. H. Kruse Grain & Milling Co. v. Commissioner, 9 Cir. 1960, 279 F. 2d 123, lists only eleven criteria to be applied in determining whether amounts transferred to a corporation are the result of a sale or a capital investment (not the same as a contribution to capital) (R. 734 - 735), the trial court's conclusions set forth sixteen criteria to be applied to the question herein of whether there is a sale or a contribution to capital. (R. 740-726). Similarly, in Kolkey v. Commissioner, 27 T. C. 37 (1956), which Commissioner v. Brown, supra, noted at footnote 7 was a case where the "sale" price was grossly excessive, the criteria set forth to determine whether there was a sale or capital investment (not a contribution to capital) only totaled eight. (R. 732 - 733). And in J. S. Birtz Construction Co., Par. 66, 227 P-H T. C. Memo Dec. (1966), a sole stockholder case which Conclusion of Law XVII states is "interesting for its recitation of the proper factors of decision" (R. 738), the criteria to be applied to determine whether there was a sale or capital investment (not a

contribution to capital) are eleven.

Nowhere in the Conclusions of Law is there set forth a case or several cases which announce the factors which determine whether there is a sale or a contribution to capital which are then applied to the facts of this case. The vice of failing to do so is best illustrated by comparing the criteria set forth by Judge Barnes in the Kruse case, supra, with the sixteen criteria actually applied by the trial court here in Conclusions of Law XXI through XXXVIII (R. 740 - 746). In doing so the Court will observe that only two of the criteria set forth by Judge Barnes (Nos. 3 and 8 found at R. 734) have been applied. Why? The answer is obvious. It is because the application of the other criteria here such as Nos. 1, 2, 4, 7, and 11 (R. 734), for example, are favorable to appellant. Similarly, only two of the criteria set forth in Kolkey, supra, (Nos. 1 and 5) are applied (R. 740 - 746) whereas several favorable to appellant are not applied, i. e. (8) was the price disproportionate to the fair market value, (7) was any control reserved as an integral part of the plan under the notes, (5) were payments of principal subordinated to dividends and other creditors, and (2) what was the business purpose in organizing the corporation. (R. 733). Likewise, only five of the eleven criteria set forth in Biritz, supra, (Nos. 1, 3, 6, 7 and 11) were applied, of which 1, and 3 are incorrectly applied. (R. 738, 740 - 746).

Furthermore, it is significant that of the sixteen criteria actually applied by the trial court only six were extracted from the above cases which allegedly set forth the proper criteria. The other ten just dropped out of the blue, so to speak, as each

was applied. Thus, absence of interest (R. 740, XXI), inordinately postponed due date (R. 740, XXII), assets revived corporation (R. 741, XXIII), assets essential to corporation (R. 741, XXIV), lack of formal security (R. 742, XXVII), absence of a sinking fund (R. 742, XXVIII), disproportionate debt-equity ratio (R. 743, XXIX), confusion of transferor's activities with corporation's activities (R. 744, XXXII), attempt to "dress up the transaction" (R. 744, XXXIII), no business purpose (R. 744, XXXIV), tax avoidance motive (R. 745, XXXV), lack of "substantial economic reality" (R. 745, XXXVI), and not arm's length (R. 746, XXXVIII) are all thrown in the hopper, some with a case citation and some without.

In short, what the government has done is take 6 of the 11 tests to determine if silver exists, 10 of the 40 or more tests to determine if helium gas is present, and then applied all 16 to a substance and determined that it is gold.

The hard fact is that the conclusions of law do not contain a single case or series of cases setting forth the criteria to be applied in determining under Section 362 (a) (2) or any other section whether a transfer to a corporation is a sale or a contribution to capital. And if any did so qualify, those criteria were not in fact applied here. Such failure is particularly illuminating when it is recalled that the leading text in federal income taxation sets forth the applicable cases in discussion of Section 362 (a) (2) and a footnote at 3A Mertens, Law of Federal Income Taxation § 21.127, footnote 16 stating:

"It may be necessary to ascertain whether the property was sold to the corporation or contributed to its

capital. See Herff v. Dittmar Land Co. 32 BTA 349; Hollywood, Inc., 10 T. C. 175 (1949); Curran v. Comm., 49 F. (2d) 129 (CCA 8th, 1931); Sun Properties, Inc. v. U. S., 220 F. 2d 171 (CA 5th, 1955); Las Vegas Land & Water Co., 26 T.C. 881 (1956)."

However, not one of these cases ruled that there was a capital contribution, and the criteria applied therein show that appellant would prevail here if they were applied. Sun Properties, Inc. v. U. S. 5 Cir., 1955, 220 F. 2d 171, rejects most of the arguments made by the government here including the arm's length contention. See 220 F. 2d 171, 174 - 175, where the Fifth Circuit expressly held it would be "judicial legislation of the most inexcusable kind for a court" to disregard a transaction simply because it was not at arm's length, held there is no requirement that a transaction must be done in the customary manner, denied that a court made requirement of a business purpose independent from taking a gain is required to qualify a transaction as a sale, refused to hold that a 'thin' corporation is a ground to infer there was a contribution to capital, and finally, citing Gregory v. Helvering, 293 U. S. 465, as authority, pointed out that "a tax avoidance motive must not be considered as evidence that a transaction is something different from what it purports to be."

In addition to the above cases, the Pocket Supplement cited Murphy Logging Co. v. United States, 239 F. Supp. 794, as contra, but it was reversed in this Court at 378 F. 2d 222.

Applying erroneous tests was not the worst done in the conclusions of law. Even those tests were faultily applied. For

example, there was no subordination in fact here. After \$300,000 of principal payments were made through 1963, Gyro had to pay \$103,277.98 of taxes and interest herein, and was, as was stipulated, unable to make the payment for 1964 and 1965. (R. 87). The government, which has taken the cash proceeds after expenses and has asserted deficiencies against Chris and Natalie Mowry on the ground that the annual payments are dividends since the apartments constituted a contribution to capital, now says that since it has been paid there has in fact been a subordination. Also, there is no lack of security as the sale agreement demonstrates. Further, there was no absence of operating capital. Nor did they "dress up" the transaction. Also there were several business purposes. And to say the sale was not at arm's length when the property was sold for its fair market value is wholly erroneous.

Illustrative of the abject poverty of the government's case is its citation of Thielens v. United States (N. D. Ala. Sept. 21, 1965) (R. 739). There Mr. Thielens agreed with the government that there had not been a sale but a contribution to capital (R. 357 - 358), and that the price paid by the corporation greatly exceeded the fair market value. (R. 360). Is it any wonder the trial court held there was no question of fact for the jury, granted a directed verdict, and held there was a sale?

XII

The Case Cited By The Government To Support Its Interpretation Of Section 362 (a) (2), Murphy Logging Co. v. United States, 239 F. Supp. 794 (D. Ore.

In the opening brief filed below, the plaintiff pointed out that although the government specifically relied on Section 362 (a) (2), none of the cases gathered together by Mertens on the problem of determining whether there was a sale or contribution of capital under Section 362 (a) (2) had ruled in favor of the government. (R. 322 - 323). The government's brief replied by citing Murphy Logging Co. v. United States, 239 F. Supp. 794 (D. Ore. 1965) as one of the cases cited by Mertens on the point in the pocket supplement. (R. 504-505). However, subsequent to the trial court's ruling on March 22, 1967, Murphy Logging Co. v. United States, supra, was reversed by this Court on May 15, 1967 in 378 F. 2d 222. (R. 680 - 685).

XIII

Since Gyro Did Purchase The Apartments, It Is
Entitled To Non-Recognition Of Gain Under Section
1033 With Respect To The Paloma Street Condemnation
Award

There was a sale and purchase by Gyro of the apartments on January 1, 1959. Therefore, it did purchase property within the meaning of Section 1033.

CONCLUSION

The Commissioner's approaches herein are a form of legalistic schizophrenia. First, he disregarded the corporation and assigned the income to Chris and Natalie Mowry, later issued a

notice of deficiency which disallowed Gyro's purchase price cost basis but took no position, next said the sale was a nontaxable exchange, later actually signed a stipulation stating that Gyro purchased the apartment buildings, later claimed there was no sale but a capital contribution, later in the oral argument stated that the only issue here is whether Gyro is entitled to a refund and not whether there was a sale (Tr. 713 - 714), and finally in his brief, told the trial court that it need not make any conclusions on the above points but should "simply hold that taxpayer has not carried its burden of proof." (R. 537).

In short the government had no position on the law except in the sense that it adopted a new and often contradictory position every few months. Its real position is set forth at page 1 of its post trial brief in the trial court:

"Stripped to 'bare bones,' defendant's principal contention upon both major issues is that the purported sale of the apartment properties to Gyro was a sham transaction without substance or business purpose excepting tax avoidance." (R. 494).

That is, the government equates tax avoidance with sham transaction, and thereby hopes to negate the Supreme Court's ruling that a tax avoidance motive must not be considered as evidence that a transaction is something different from what it purports to be, Gregory v. Helvering, supra, and also to negate the decision of Congress in 1951 that the stepped up basis would not be denied in dealing with the problem of sales of depreciable assets to controlled corporations but capital gain would be denied in certain cases.

The word "sham" is the new magic word which is replacing the older slogan of "substance over form". No criteria are announced or applied. The technique is simply to utter the word whenever a larger tax can be collected.

The trial court should be reversed.

Respectfully submitted,

MC LANE & MC LANE

William Lee McLane
By William Lee McLane

Nola McLane
Nola McLane

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: April 13, 1968

William Lee McLane
William Lee McLane

APPENDIX A

EXHIBITS

NUMBER	IDENTIFIED*	OFFERED*	RECEIVED*	REJECTED*
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Exhibits to Stipulation of Facts No. 1:

1 through 8	40	40	41	
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Exhibits to Stipulation of Facts No. 2:

9 through 12	40	40	41	
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Plaintiff's Exhibits:

1	92	93	93	
2	133	362	362	
3	163			
4	206	374	374	
5	206	382	382	
6	206	386	386	
7	206	388	388	
8	206	391	391	
9	245	460	460	
10	351	460	460	
11	391	407	409	
12	393	393	394	

Defendant's Exhibits:

A through D	447	447	448	
E	610	609		609

*Page references are to Transcript.

NO. 22501 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLAUDE FRANKLIN MOORE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
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FILED

JUN 20 1968

WM. B. LUCK, CLERK

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NO. 2 2 5 0 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLAUDE FRANKLIN MOORE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT
AND
STATEMENT OF THE CASE

Appellant, Claude Franklin Moore, was charged in a single-count indictment with violation of Section 2312 of Title 18, United States Code (Interstate Transportation of Stolen Motor Vehicle).

Appellant was found guilty on July 18, 1966, after a court trial before the Honorable Roger D. Foley, in the United States District Court for the Southern District of California, Central Division.

The Court below sentenced appellant on July 25, 1966, pursuant to the Federal Youth Corrections Act, Section 5010(c) of Title 18, United States Code.

Appellant, in Forma Pauperis, appeals from his conviction and sentence.

The District Court had jurisdiction of the case under Section 3231 of Title 18, United States Code.

This Court has jurisdiction under Section 1291 and 1294 of Title 28, United States Code.

II

STATEMENT OF FACTS

At approximately 4:30 P.M. on Friday, June 10, 1966, appellant was arrested in Redondo Beach, California by Alan Duwayne Woods, a patrolman for the City of Redondo Beach (Tr. 34, 35 and 43). ^{1/} Patrolman Woods testified he arrested the appellant in accordance with a warrant, which charged appellant with a 1962 burglary.

At the time of arrest defendant was seated in a white 1961 Chevrolet convertible (Tr. 35). Officer Woods informed appellant of his rights and asked to see a copy of the registration slip which the appellant could not produce (Tr. 38).

When the vehicle identification number was checked it was found that the car was registered in the name of a Mr. Charles A. Cusimano, a used car dealer in New Orleans, Louisiana. Mr. Cusimano testified that on either May 28 or 29 he discovered that the white 1961 Chevrolet was missing from his used car lot (Tr.

^{1/} "Tr." refers to Reporter's Transcript of Proceedings.

5 and 6). He further stated that the vehicle had no current license or registration and that he had given no one permission to use it (Tr. 5 and 6).

Appellant was taken by Officer Woods and another officer to the Redondo Beach Police Station where he arrived about 6:00 p.m. (Tr. 43) and was booked at 6:16 p.m. (Tr. 34).

On June 13, 1966 at approximately 10:00 a.m., Russell Pelz, a police officer for the city of Redondo Beach, met with the appellant at appellant's request (Tr. 48). After being advised of his constitutional rights (Tr. 25), appellant stated that on or about May 25, 1966, while in Alabama, he requested a friend to go out and get him a car. This friend, whom appellant would not name, returned later that day with a 1961 white Chevrolet convertible which had no license plates. Appellant removed the license plates from a 1953 Plymouth that he had been using and put them on the 1961 Chevrolet. He then disposed of the 1953 Plymouth by dumping it into the water at the west end of the 9th Street Bridge in Mobile, Alabama. He further stated to Officer Pelz that he drove the 1961 Chevrolet to California (Tr. 26 and 27).

Officer Pelz also testified that appellant offered to admit to the burglary if he could be guaranteed less than five years in a California prison. Officer Pelz refused this offer stating that he did not want appellant to admit to anything not done and would make no promises to him (Tr. 28 and 33).

Officer Pelz called the local Federal Bureau of Investigation office (Tr. 32).

Special Agents Barry and McGuire arrived at the Redondo Beach Police Station at approximately 4:00 p.m. to interrogate appellant concerning the car (Tr. 13, 14, 15 and 16). At this time the car had not been verified as stolen (Tr. 73).

Agent Barry advised appellant of his constitutional rights and after appellant indicated that he fully understood these rights he began his questioning (Tr. 10, 11 and 19). Agent Barry testified that he and McGuire interrogated appellant for about 30 or 40 minutes (Tr. 14) and that Officer Pelz was not present before or during the interview (Tr. 15 and 16).

Agents Barry and McGuire obtained a signed statement from appellant which contained substantially the same fact content as the statements made to Officer Pelz concerning the obtaining and use of the vehicle. Appellant also indicated to Agent Barry that his past experience with his friend who brought him the car, led him to believe that the car was stolen and that he realized, if the car were stolen, he had violated federal law by transporting a stolen car across state lines to California (Tr. 21, 22 and 71). The appellant also told Agent Barry that he drove to California from Mobile, Alabama through Illinois, Indiana, Iowa, Nebraska, Colorado, Utah, Wyoming, and Nevada using the on and off switch as he had no keys to the car (Tr. 71 and 72).

Agent Barry testified that he made no promises and that he told appellant that he had no knowledge of any prosecutions pending in the state of Louisiana (Tr. 15 and 75).

On June 14, 1966 appellant was brought before the United

States Commissioner on the federal charge. The 1962 burglary charge was dropped as indicated on the booking sheet (defendant's Exhibit A (Tr. 33)). There was some disagreement over who signed the booking sheet. Officer Pelz indicated another officer had done so (Tr. 69) and appellant claimed it was Officer Pelz (Tr. 76 and 77).

Appellant testified that he was arrested at about 4:30 p.m. and arrived at the police station at about 6:00 p.m. where he was interrogated briefly by a desk sergeant concerning the 1962 burglary (Tr. 43 and 44).

Appellant further testified that he requested a phone call on the way to, and when he arrived at, the station (Tr. 51) but was not allowed to make one until 2:00 a.m. At this time, according to his testimony, he placed a call to an agent for a Louisiana bonding company which had him on a bail bond, but was unable to complete the call as the agent was not in his office (Tr. 47). He was told he could complete the call later. At 4:00 a.m. the next morning when he requested permission to place the call he was told by an officer that the call would not be necessary as a hold had been placed upon him for bail jumping by the State of Louisiana (Tr. 47). Appellant further stated that the officer told him that the state of Louisiana would take appellant back if he were not prosecuted on the burglary charge (Tr. 47 and 48) and that he later learned there was no such hold (Tr. 50).

As to the interrogation by Officer Pelz, appellant testified that he was not fully advised of his constitutional rights. He

claimed that Officer Pelz offered him an opportunity to place a phone call, but did not advise him of his right to an attorney (Tr. 6).

Appellant further stated that he offered to confess to the burglary if Officer Pelz could guarantee him that he would not have to return to Louisiana but Officer Pelz said he could not do this (Tr. 48). However, appellant claimed that Officer Pelz told him that he would be tried in California if the car proved to be stolen and that he promised to cancel the burglary charge or would be dismissed if appellant gave a statement concerning the car (Tr. 48, 49, 58 and 59).

Appellant also testified that just prior to his interrogation by Special Agents Barry and McGuire, Officer Pelz stated to him that he still did not know whether the car was stolen. He allegedly advised appellant to give the Federal Bureau of Investigation a statement and that if the car had been stolen, the hold on the burglary charge would be dismissed (Tr. 50).

Appellant testified that since a Redondo Beach Police Officer had informed him that there was a hold placed on him for bail jumping in Louisiana, he thought there was an immediate prospect of his being returned to Louisiana. To delay his return, he gave statements about the car to Officer Pelz and Agent Barry but he later learned there was no such hold (Tr. 50 and 78).

On rebuttal Officer Pelz denied that he had promised to dismiss the burglary charge if a statement was given by appellant to the Federal Bureau of Investigation or that he told appellant

that since the burglary warrant was old there would probably be no prosecution on it (Tr. 65 and 66). Agent Barry also indicated that no promises had been made (Tr. 72) although appellant expressed concern about pending prosecution in Louisiana and California. Agent Barry stated that he had no knowledge of any other possible prosecutions (Tr. 75).

Appellant moved to strike the testimony of the Redondo Beach Police officers and Agent Barry concerning statements given by him (Tr. 79 and 85) on the grounds that he was under duress at the time. The trial court denied the motion and found that appellant was accorded all of his constitutional rights by the Redondo Beach Police and the federal agent (Barry) before making his inculpatory statements (Tr. 88).

The court below found no evidence of a "police-dominated atmosphere" that would cause a psychological disadvantage to appellant, and further found that all of the safeguards required by Miranda v. Arizona, 384 U.S. 436 (1966) were followed (Tr. 88).

The trial court also held that, even without the inculpatory statements, appellant was found in possession of a stolen vehicle and that possession was unexplained which raised the following inferences: (1) that appellant transported the motor vehicle in interstate commerce and (2) that he knew it to be a stolen vehicle (Tr. 88).

Thereupon, the trial court adjudged appellant guilty as charged (Tr. 89).

III

ARGUMENT

- A. APPELLANT'S STATEMENTS TO POLICE OFFICER PELZ AND FEDERAL AGENT BARRY WERE PROPERLY ADMITTED AS THEY WERE MADE AFTER APPELLANT RECEIVED ADEQUATE MIRANDA WARNINGS AND AFTER HE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHTS.
-

At the close of the trial appellant moved that the statements made to the police officers and an agent of the Federal Bureau of Investigation be stricken from the record. This motion was made on the grounds that appellant had given these statements under the duress of a "police dominated atmosphere" and because of this pressure the statements were not voluntary (Tr. 84, 85 and 86).

The Court found, upon examining the testimony of the officers, as well as the appellant, that the appellant had been accorded all his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966) and that there was no "police-dominated atmosphere" which would have pressured appellant into his statements (Tr. 88).

It is urged by the Government that the only argument which may be made on appeal concerning the appellant's admissions would derive from the motion to suppress the statements on the grounds of duress (Tr. 84-86). The record reveals that for each of the other asserted grounds appellant failed to exercise the

remedies available to him at trial. Unless good cause for such failure can be shown it is settled that "failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal. . . ." Bouchard v. United States, 344 F.2d 872, 875 (9th Cir. 1965) cited in Toland v. United States, 365 F.2d 304, 306 (9th Cir. 1966).

The Court in the Toland case, *supra*, at 306 note 1, gives an example of what might constitute good cause. The Court points out that where a right has not yet been recognized by the appellate courts such failure may not preclude an appeal on the basis of the violation of that right, citing the Court's discussion of the Westover case in Miranda v. Arizona, 384 U.S. 436, Footnote 69 (1966).

If appellant argues that his motion to strike at the end of the trial was a general one and not intended to be limited to the grounds of duress then the trial Court's ruling precludes further argument on appeal. If the objection is specific, as it appears to be, appellant is limited to the grounds specified. This is pointed out in United States v. Indiviglio, 352 F.2d 276, 279 (2nd Cir. 1965):

"Wigmore says 'the cardinal principle (no sooner repeated by Courts than ignored by counsel) is that a general objection, if overruled, cannot avail the objector on appeal, ' and 'a specific objection overruled will be effective to the extent of the grounds specified, and no further.' "

In On Lee v. United States, 343 U.S. 747 (1951), the Court said that the orthodox rule of evidence requiring specification of the objection, "is buttressed by the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation." On Lee v. United States, supra at 750 n. 3.

It is further clear that this was not "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure, United States v. Armetta, 378 F.2d 658 (2nd Cir. 1967).

In the Armetta case the defense counsel raised an objection as to the sufficiency of the warnings given to the defendant. The trial judge allowed the witness to testify subject to a motion to strike if the Special Agent had not in fact given proper warnings. There was no further motion made. The Court held that because of the evident familiarity of defense counsel with the Miranda decision and the familiarity of those lawyers involved in the criminal courts, this could not be a case of excusable neglect or one falling within the provisions of the "plain error" rule. Armetta, supra, at 661.

In the case at hand the appellant objected to the admission of statements made by Special Agent Barry on the grounds that no foundation had been laid (Tr. 10). This objection was sustained and further testimony was elicited concerning the warnings (Tr. 11). At this point appellant again interjected the same objection and voir dired Agent Barry. After the voir dire (Tr. 12-18) and further testimony by Agent Barry concerning the warnings (Tr. 18 and 19) appellant failed to renew his objections, apparently

satisfied that proper warnings and waivers had been given. Because of this failure to renew his objection the statements made to Agent Barry were properly allowed into evidence.

As to Officer Pelz's testimony the appellant requested to voir dire Officer Pelz before allowing Barry to testify as to the statements (Tr. 19). The Court informed appellant that if he felt at the time of the examined Officer Pelz that there might be grounds for exclusion of the statements by Pelz and Barry then he could make a motion at that time (Tr. 19). There was never any such objection to the fact that Officer Pelz had not properly given the Miranda warnings or obtained a knowing and intelligent waiver from appellant. There is likewise no indication of any objection to any warnings given by or waivers given to any other officer.

It is urged by the Government that appellant's arguments concerning the failure to properly give the Miranda warnings or to demonstrate a knowing and intelligent waiver are not properly raised on appeal and should not be considered by this Court.

But even assuming that appellant has properly laid a foundation for raising these arguments they have no basis in substance. Each rests on an evaluation of the evidence contrary to the findings of the trial judge.

1. THE WARNINGS GIVEN BY THE
REDONDO BEACH POLICE AND
THE FEDERAL BUREAU OF
INVESTIGATION OF THE APPEL-
LANT'S CONSTITUTIONAL RIGHTS
WERE FULLY AND EFFECTIVELY
STATED.

The Government did not introduce any statements made to the arresting Officer Woods (Tr. 34-36). The conversation between Woods and appellant was brought out by appellant upon cross-examination (Tr. 36-41). The only related point, defendant's inability to produce a registration slip for the car, had no bearing on his arrest which was on a felony warrant (Tr. 39).

Again, defendant, and not the Government, in defendant's case-in-chief, offered the only evidence about an interrogation by the desk sergeant, which was solely related to the burglary charge, and held immaterial and irrelevant by the trial Court (Tr. 44-45).

The warnings given by Officer Pelz are reflected by his testimony (Tr. 25):

"I advised the defendant that he had the right to remain silent, that anything that defendant said could be used against him in court proceedings that were to follow, also that he was entitled to have an attorney of his own choice and in the event he was unable to afford an attorney that the court would appoint the public defender, the public defender was available to him.

"Q. (By Counsel for the Government): And did you indicate when he was entitled to have an attorney at what point?

"A. I told him he could have it any time he wanted one, at any time he wanted to call one."

Appellant's version of the warnings is in disagreement with the above (Tr. 46).

"Q. (By Counsel for appellant): Ok. Now, at that particular time did he advise you of your rights, or do you remember?

"A. He advised me of my right to stay silent, that anything I said could be used against me.

"Q. Did he advise you of your right to have an attorney before you made any statements to him?

"A. He didn't. He asked me if I wanted to make a phone call, and that was the extent of it."

It clearly appears that the warnings given by Officer Pelz met the requirements set out in Miranda v. Arizona, supra. The Miranda decision demands that:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to presence of an attorney, either retained or appointed." Miranda, supra, at 444.

It is also clear that the warnings given by Agent Barry

were complete (Tr. 10, 11, 18 and 19). Here appellant was told, in substance, of his right to remain silent (Tr. 10 and 18), that any statement that he might give could be used against him in Court (Tr. 19), that he had a right to an attorney (Tr. 10, 11 and 19), and that if he could not afford an attorney one would be appointed for him (Tr. 10). A review of this testimony indicates that all the safeguards had been met by Agent Barry using the Federal Bureau of Investigation warning procedure approved in Miranda, supra, at 483-484.

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties." Coyote v. United States, 380 F.2d 305 (10th Cir. 1967). What Miranda does require is meaningful advice to the unlettered and unlearned in language which can be comprehended and on which he can knowingly act. Coyote, supra, at page 308. The Coyote court accordingly held that warning to the effect that the defendant " . . . can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke" was sufficient under Miranda.

In Keegan v. United States, 385 F.2d 260 (9th Cir. 1967), this Court held the following warning to be an effective equivalent.

"You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Keegan, supra, at 262, 264.

Appellant also argues that appellant should have been warned that in addition to remaining silent and not answering any questions, that "if he does answer any questions he may terminate the interrogation at any time he wishes and may request an attorney even though he has responded to some questions" citing Miranda, supra, at 473 and 474.

A careful reading of Miranda discloses that this is not one of the warnings which must be given but is merely a right of the person under interrogation which must be honored at anytime he chooses to exercise it. Miranda, supra, at 444 and 479.

Therefore it appears that appellant's only argument as to Officer Pelz's warning is based on a conflict in testimony between Pelz and the appellant. This then became a question of fact for the trial judge to resolve and goes to the credibility of the witnesses. As to the sufficiency of the warnings given by Pelz and Barry a reading of these warnings clearly indicates that they fully afforded the appellant with the necessary safeguards to thoroughly protect his privilege against self-incrimination.

2. THE WAIVER BY APPELLANT
OF HIS CONSTITUTIONAL RIGHTS
WAS NOT INDUCED BY INCOM-
MUNICADO INCARCERATION
PRIOR TO INTERROGATION, OR
TRICKERY, OR BY ANY PROMISES
OF DISMISSAL OF CHARGES.

The appellant claims that he was held without the benefit of a telephone call, that he was pressured with the threat of a hold and that promises were made to him in order to obtain statements from him, and because of the above, he was subjected to a "police-dominated atmosphere" which prevented him from giving a voluntary waiver of his rights as provided for in Miranda, supra.

The trial court in evaluating this claim found no evidence of any such "police-dominated atmosphere" which would prevent the appellant from voluntarily waiving his rights (Tr. 88). In so ruling the trial Court made an evaluation of the evidence presented and an evaluation of the credibility of each witness and unless this Court finds no basis for such a decision viewing the evidence in the light most favorable to the Government, the judgment of the trial Court should stand. Fraker v. United States, 294 F.2d 859, 861 (9th Cir. 1961).

The burden of showing that the statements made were involuntary is on the appellant and in absence of evidence other than the appellant's testimony, there is no grounds for error alleged or proved in this case. In Redmon v. United States, 355 F.2d 407 (9th Cir. 1966) appellant claimed that statements made

to police were induced by promises and the Court stated:

"The burden is upon appellant to show error.

This he has failed to do. Appellant testified in his own behalf but offered not a scintilla of evidence that the statements made by him at the police station were involuntary, coerced, or induced in any manner. We find elsewhere in the record nothing to substantiate appellant's contention unless we indulge in surmise, conjecture, and unwarranted assumptions." Redmon, supra, at 412 and 413.

Here the only other evidence to substantiate appellant's claims of involuntariness was the booking sheet which only indicated that the prior burglary had been dropped. The denials of any promises by both Pelz and Barry (Tr. 33, 15, 75, 65 and 66) substantially diminish any value the booking sheet evidence may have had to the defense. As this Court is well aware law enforcement authorities often dismiss charges in favor of prosecution by other authorities on different charges to avoid senseless expenditure of time and money.

3. THE CONFESSION OBTAINED BY
THE FEDERAL BUREAU OF
INVESTIGATION WAS ADMISSIBLE
EVEN THOUGH OBTAINED
FOLLOWING INTERROGATION
BY LOCAL POLICE.

Appellant seems to believe that this case is on "all fours" with the case of Westover v. United States, 384 U.S. 436 (1966), a companion case to Miranda v. Arizona. But the two cases are clearly not related. Westover was arrested by local police on a burglary charge and questioned the entire morning by local police, without benefit of any warnings. At noon the Federal Bureau of Investigation took over the interrogation and after another two to two and one-half hours a confession was obtained. There was also no indication of any waiver by Westover to the Federal Bureau of Investigation warnings, Westover, supra, at 496. The Court found that:

"Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed." Westover, supra, at 496.

In the present case there is no indication that there was the type of intensive run-on interrogation found in Westover. The Barry interrogation was removed in time from the initial interrogation by Pelz and there is no indication that it even was in the same

room. Here also full warnings were given by local police (Tr. 25) and warnings and a waiver were given and obtained by Agent Barry. Clearly the appellant understood that the two interrogations were not the same and the harm which Westover was designed to protect against was not present in the existing case.

4. THE APPELLANT KNOWINGLY
AND INTELLIGENTLY WAIVED
HIS FIFTH AMENDMENT RIGHT
AGAINST SELF-INCRIMINATION.

The Miranda decision does not set out a single test of what constitutes a waiver but rather leaves it to each Court to decide on an ad hoc basis if the waiver was sufficient.

" 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. ' " Miranda, supra, at 476, citing Carnley v. Cochran, 369 U.S. 506, 516 (1962).

In the present case clearly the indication to Agent Barry, by appellant, that he understood the warnings fully and was willing to discuss the vehicle was sufficient (Tr. 11). Officer Woods informed the appellant of his rights upon arrest (Tr. 38). The appellant then had the entire weekend to think over what Woods had told him. On Monday he voluntarily asked to see Officer Pelz

(Tr. 48) and at this time he again was informed of his rights (Tr. 25) and then at this time voluntarily chose to give his statement.

This situation is far from the dangerous situation in which warnings are haphazardly given and a statement is immediately taken. Here the appellant had the opportunity to understand the situation he was in and to ponder his rights. The above facts establish a knowing and willing waiver by the appellant in a more convincing manner than could be established by any verbalized waiver.

**B. THE INDEPENDENT EVIDENCE IS
SUFFICIENT TO SUSTAIN THE
CONVICTION.**

The facts of this case clearly points out that even without the admissions by appellant there was sufficient evidence to sustain a conviction. The possession of the vehicle and the testimony of Mr. Cusimano, who was found because of the vehicle identification number and not because of any admissions by appellant, was sufficient to produce a conviction. But the Government feels that it must point out that the case of Lynumn v. Illinois, 272 U.S. 528 (1963) requires reversal, regardless of the other evidence, if the admissions were improperly allowed into evidence.

C. THE CLAIM OF IMPROPER
SENTENCE IS FRIVOLOUS.

The decision whether to sentence defendant under Title 18, United States Code, Section 2312, or under the Federal Youth Corrections Act, Title 18, United States Code, Section 5010(b), is within the trial Court's discretion, Standley v. United States, 318 F. 2d 700 (9th Cir. 1963).

IV

CONCLUSION

The Government submits that because of the procedural failure of appellant to properly raise his arguments and also because of the substantive weaknesses of those arguments the judgment below should be sustained.

Respectfully submitted,

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ROBERT L. BROSIQ,
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THEODORE E. ORLISS,
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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Theodore E. Orliss

THEODORE E. ORLISS

No. 22503

IN THE
**United States Court of Appeals
for the Ninth Circuit**

EDGAR P. GAUTREAUX, etc. et al.,
Appellants,

vs.

KATHERINE KUMM and MARY J. SWEENEY,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA.
HON. A. ANDREW HAUKE, JUDGE.**

APPELLEES' REPLY BRIEF

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FILED

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IN THE
**United States Court of Appeals
for the Ninth Circuit**

EDGAR P. GAUTREAUX, etc. et al.,

Appellants,

vs.

KATHERINE KUMM and MARY J. SWEENEY,

Appellees.

APPELLEES' REPLY BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court, Central Division of California, in an action in interpleader, entered September 12, 1967, ordering distribution of certain funds deposited into the registry of the court by the plaintiff in interpleader.

The District Court had jurisdiction under the Interpleader Act, 28 U.S.C. Sec. 1335(a). This Court has jurisdiction under the provisions of 28 U.S.C. Sec. 1291 on the appeal from a final judgment.

STATEMENT OF THE CASE

A. Statement of the Pleadings

Plaintiff, Travelers Indemnity Company, filed an action in Interpleader under an insurance policy naming Mary J. Sweeney as an insured and covering the automobile in which appellee Katherine Kumm was riding. The policy limits were \$20,000 for public liability and \$5,000.00 for property damage, a total of \$25,000.00, which was paid into the registry of the Court by plaintiff. Answers were filed by claimants to the property damage portion of the policy and by appellants and appellees to the public liability portion. Plaintiff received a summary judgment and was dismissed from the case, and the property damage claimants settled their claims by stipulated judgment, leaving only appellants and appellees as litigants in the within action.

Appellees, Mary J. Sweeney and Katherine Kumm, filed an answer and cross-complaint naming appellants and cross-defendant Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, alleging a cause of action against Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, who was the driver of the automobile in which Katherine Kumm was riding, for personal injuries sustained by Katherine Kumm as a result of the negligence of Ann Margaret Baumbach, and a cause of action for the wrongful death of Elva Baumbach, the mother of appellees Katherine Kumm and Mary J. Sweeney. (Clk. Tr. pp. 2-14)

Appellants Edgar P. Gautreaux, individually, and as Executor of the Estate of Agnes Leonard Gautreaux, deceased, and Shirley Gautreaux and Eloise Gautreaux, children of Edgar P. Gautreaux and Agnes Leonard Gautreaux, filed an answer and and cross-complaint against Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, and against appellees for personal injuries sustained by Edgar P. Gautreaux, Shirley Gautreaux and Eloise Gautreaux, and for the wrongful death of Agnes Leonard Gautreaux. (Clk. Tr. pp. 15-21)

Answers were filed to the cross-complaints by appellees and Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, (Clk. Tr. pp. 22-28) but no answer was filed to the cross-complaint of appellees by appellants.

In their cross-complaint, appellees allege that they have filed a creditor's claim against the Estate of Ann Margaret Baumbach, deceased, and that Bettie J. Brown as Special Administratrix with general powers has rejected the claim against the estate before the filing of the cross-complaint. (Clk. Tr. pp. 8-9 [Par. III of the cross-complaint].)

No allegation of the filing of a creditor's claim against the estate of Ann Margaret Baumbach, deceased, is contained in the cross-complaint of appellants. (Clk. Tr. pp. 16-21)

A pretrial conference was held and a pretrial conference order made reciting that the sum of \$19,276.21 remains in the registry of the court and permitting

the withdrawal of the monies to be deposited in several federal savings and loan associations pending the disposition of this action and suspending all further proceedings in the United States District Court, until appellants and appellees have liquidated their respective claims by final judgment in the actions then pending in the courts of the State of California and New Mexico and dismissing the various cross-complaints. (Clk. Tr. pp. 84-87)

Appellants filed as an exhibit a judgment from the District Court of the State of New Mexico against Kathryn A. Kumm and *Mary J. Sweeney, Administratrix of the Estate of Ann Margaret Baumbach, deceased*, reciting that the "defendant Mary J. Sweeney is the administratrix of the Estate of Ann Margaret Baumbach, duly appointed for such purpose by the Probate Court in the State of California," and that the defendants were served by complying with the terms of the New Mexico Non-Resident Motorists Statute and have defaulted, rendering a default judgment as prayed in the complaint for \$100,000.00 for Edgar P. Gautreaux as administrator of the Estate of Agnes Gautreaux, deceased, for \$5,000.00 in favor of Edgar P. Gautreaux, individually, for \$10,000.00 for Shirley Gautreaux and for \$10,000.00 for Eloise Gautreaux. (Clk. Tr. pp. 97-100)

Appellees filed a "Motion for Disposition of Funds on Deposit," praying that the Court "distribute the funds on deposit among the persons entitled thereto, based upon the judgments on file herein, after a hearing for the purpose of equitably distributing the funds which are insufficient to pay both judg-

ments in full," attaching as an exhibit a certified copy of a judgment received in the Superior Court of the State of California for the County of Los Angeles, after a court trial, against the defendant Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, in favor of plaintiff Katherine Kumm in the sum of \$25,000.00 for personal injuries and in favor of Katherine Kumm and Mary J. Sweeney in the sum of \$10,000.00 for the wrongful death of their mother, Elva Baumbach. By a separate provision, execution was limited to the funds on deposit in the United States District Court in this action.

An affidavit accompanying the motion recites that with respect to plaintiff Katherine Kumm the "judgment was obtained to compensate said plaintiff for personal injuries including a plurality of fractured ribs, a fractured pelvis, multiple internal injuries, severe cuts and lacerations on her face, hands and legs, multiple bruises and contusions to various parts of her body, and including medical expenses and loss of wages as a sales clerk from July 15, 1964, to October 24, 1964, in the total sum of \$4,382.70, actual losses sustained by way of special damages, and that as to plaintiffs Katherine Kumm and Mary J. Sweeney for the loss of their mother in the wrongful death cause of action, the judgment includes "the sum of \$1,909.52 for actual burial and funeral expenses paid by said plaintiffs." (Clk. Tr. pp. 101-106)

Appellants filed a "List of Exhibits to be offered by defendants Gautreaux," including a list of special damages sustained by appellants as follows: Charles

W. Kenny, M.D. for Edgar P. Gautreaux \$181.20, for Shirley Gautreaux \$161.20, for Eloise Gautreaux \$176.80; Rollie Mortuary Bill \$582.36; Bill of F. W. Parker, M.C. for Agnes L. Gautreaux \$125.00; Bill of John W. Martin, M.C. for Agnes L. Gautreaux \$78.00; Transportation expense for casket and funeral, Chauvin Funeral Home \$440.00; 4 Ticket stubs for transportation of casket \$90.89; Ray J. Chassiva, Tombs \$422.20; St. Mary Hospital Bill for Edgar P. Gautreaux \$147.20, for Agnes L. Gautreaux \$240.59, for Shirley Gautreaux \$241.45, for Eloise Gautreaux \$194.65; Ticket stubs for transportation of Edgar P. Gautreaux and daughters from Gallup, New Mexico to Houma, Louisiana, A.T. & S.F. Ry. \$128.50 and So. Pacific Ry. \$7.00. (Clk. Tr. pp. 69-70)

Appellees set forth their special damages in the "Memorandum of Contentions of Fact and Law Filed on Behalf of Defendants Katherine Kumm and Mary J. Sweeney," as follows: "Katherine Kumm claims the following special damages, to wit: St. Mary's Hospital, Gallup, New Mexico \$316.00; two ambulance trips, Gallup, New Mexico \$75.00; St. Mary's Hospital, Long Beach \$1,447.20; Ambulance, Los Angeles to Long Beach \$75.00; Dr. Arthur Beland \$650.00; Dr. E. Wiater \$230.00; Dr. K. V. Johnson \$115.50; Dr. Ross Delinger, (not discharged) \$220.00; Medicine \$35.00; Loss of wages from July 15, 1964 to October 20, 1964 as sales clerk at \$375.00 per month \$1,219.00; Total specials of Katherine Kumm \$4,382.70. Burial and funeral expenses of Elva Baumbach, deceased \$1,909.52." (Clk. Tr. p. 79)

In its Findings of Fact, the Court found that the defendants were involved in an automobile accident as a result of which Agnes Leonard Gautreaux, Ann Margaret Baumbach and Elva Baumbach were killed, and Edgar P. Gautreaux, Shirley Gautreaux, Eloise Gautreaux and Katherine Kumm were injured.

The Court further found that the death of Elva Baumbach, deceased, mother of Katherine Kumm and Mary J. Sweeney, and the personal injuries of Katherine Kumm resulted in special damages to Katherine Kumm for medical expenses and loss of wages of of \$4,382.70, and of Katherine Kumm and Mary J. Sweeney for burial expenses and funeral expenses of \$1,909.52.

The Court further found that the special damages sustained by Edgar P. Gautreaux for medical expenses were in the sum of \$328.40, for Shirley Gautreaux, a minor, in the sum of \$402.65, and for Eloise Gautreaux, a minor, in the sum of \$371.45, and that the funeral and burial expenses of Edgar P. Gautreaux by reason of the death of Agnes Leonard Gautreaux were in the sum of \$2,388.15.

The Court further found that the sum remaining on deposit and subject to distribution in the amount of \$19,276.21 and interest accumulated since the date of deposit is insufficient to pay the judgments in full. (Clk. Tr. pp. 111-113)

No objection is made on this appeal to these findings.

As Conclusions of Law, the Court concluded that each of the defendants is entitled to distribution out

of the funds on hand to the return of all special damages found and that the balance of funds remaining on deposit, after deduction of the amounts of special damages, should be distributed as follows:

One-third of the balance shall be payable to Katherine Kumm as general damages for personal injuries sustained by her.

One-third shall be payable to defendants Gautreaux for personal injuries in the following proportions:

One-fifth to Edgar P. Gautreaux;

Two-fifths to Shirley Gautreaux, a minor;

Two-fifths to Eloise Gautreaux, a minor;

One-third is payable as follows:

One-half to Katherine Kumm and Mary J. Sweeney for the wrongful death of Elva Baumbach, deceased;

One-half to Edgar P. Gautreaux as Executor of the Estate of Agnes Leonard Gautreaux, deceased.

The Court then proceeded to specify the particular amounts payable to the parties as follows:

To Katherine Kumm the sum of \$9,293.02;

To Mary J. Sweeney, the sum of \$1,745.87;

To Edgar P. Gautreaux, the sum of \$4,931.66, being the sum of \$3,349.44 to him individually and the sum of \$1,582.22 to him as executor of the estate of Agnes Leonard Gautreaux, deceased.

To Edgar P. Gautreaux, as guardian ad litem of Shirley Gautreaux, a minor, the sum of \$1,668.43;

To Edgar P. Gautreaux, as guardian ad litem of Eloise Gautreaux, a minor, the sum of \$1,637.23.

Interest accumulated in the savings and loan accounts was ordered to be divided in the same proportions as the principal amount. (Clk. Tr. pp. 114-115)

Judgment was entered accordingly. (Clk. Tr. pp. 116-118)

B. Statement of Facts

As described in the "Memorandum of Contentions of Fact and Law Filed on Behalf of Defendants Katherine Kumm and Mary J. Sweeney," this case arises out of an automobile accident on U. S. Highway 66 about four and one-half miles west of Gallup in McKinley County, New Mexico, at about 5:00 p.m. on Wednesday, July 15, 1964. A 1963 Falcon 2 door automobile driven by Ann Margaret Baumbach and having as its passengers Katherine Kumm, owner of the automobile and sister-in-law of the driver, and the mother of Katherine Kumm, Elva Baumbach, was westbound on Highway 66.

The road was a two lane paved highway with a shoulder on either side of the paved portion and at the point of collision it was straight and level running east and west. It was raining. The automobile driven by Ann Margaret Baumbach, while traveling west on Highway 66, hit a slick patch on the highway and skidded into the eastbound traffic lane, glancing off a 1961 Rambler 4 door automobile being driven by Angelina De Antonio Beutner.

Due to the glancing blow the 1963 Falcon two door automobile turned over on its side and was lying on its side when it was struck by a 1964 Pontiac auto-

mobile eastbound on U. S. Highway No. 66 and being driven by Edgar P. Gautreaux. As a result of the accident Ann Margaret Baumbach, the driver of the 1963 Falcon 2 door automobile, Elva Baumbach, a passenger therein, and Agnes Gautreaux, a passenger in the 1964 Pontiac automobile, were killed. Katherine Kumm sustained injuries including fractured ribs, a fractured pelvis, fractured spleen, multiple internal injuries, severe cuts and lacerations on her face, hands and legs, multiple bruises and contusions to various parts of her body and traumatic shock.

In a second cause of action Katherine Kumm and Mary J. Sweeney claim damages for wrongful death of their mother, Elva Baumbach against the estate of Ann Margaret Baumbach, deceased.

Before July 15, 1964, and before engaging upon this automobile trip, Katherine Kumm, Ann Margaret Baumbach, deceased, sister-in-law of Katherine Kumm, and Elva Baumbach, mother of Katherine Kumm and Mary J. Sweeney, entered into a joint venture agreement whereby said three parties agreed to pool their expenses for the purpose of engaging on this trip, and Katherine Kumm agreed to furnish her automobile for the trip as part of her consideration for the making of the trip, the agreement providing that from such pool all expenses for motels, food and automobile maintenance and repair be paid and that Ann Margaret Baumbach assist in the driving of said automobile during the trip; in accordance with said agreement the trip was commenced and each party performed her share of the agreement until the death of Ann Margaret Baumbach. (Clk. Tr. pp. 71-72)

Appellees contended that the accident was directly and proximately caused by the combined negligence of Ann Margaret Baumbach, deceased, and Edgar P. Gautreaux, driver of the 1964 Pontiac automobile, for the reason that the car in which Katherine Kumm was riding had been lying on its side in the lane in which Edgar P. Gautreaux's automobile approached, for a considerable time before it was struck by Edgar P. Gautreaux raising the issues of negligence and the application of the Doctrine of Last Clear Chance against appellant Edgar P. Gautreaux.

At the hearing upon appellees' motion for disposition of funds on deposit (Clk. Tr. p. 101), the Court stated to counsel the disposition he intended to make of the funds on deposit outlining the method he intended to use in view of the fact that the funds on deposit were insufficient to satisfy the two judgments.

Thereafter, the Court stated:

"The Court: I think the way I suggested is fair to everyone.

Mr. Lyle: *I am satisfied, your Honor.*" (Rep. Tr. [8-28-67] p. 9, l. 1 - p. 10, l. 14)

The Court proceeded then with the cooperation of counsel for appellants and appellees to compute in dollars and cents the amounts attributable to each party, the parties accepting, without objection, the amounts stated by appellants as their items of special damage in their "List of Exhibits to be offered by the defendants Gautreaux" (Clk. Tr. pp. 69-70), and accepting, without objection, the amounts stated by appellees on page 9 of their "Memorandum of Contentions of Fact and Law filed on behalf of defendants

Katherine Kumm and Mary J. Sweeney.” (Clk. Tr. p. 78)

The findings of fact and conclusions of law followed the detailed computation made by the Court with the assistance of both counsel in open court. (Rep. Tr. [8-28-67] p. 10, l. 15 - p. 27, l. 16)

ARGUMENT

I

Appellants Have Not Established Their Claim to the Fund.

The interpleader action filed by the Travelers Indemnity Company, whereby plaintiff paid into the registry of the court the sum of \$25,000.00 on behalf of the Estate of Ann Margaret Baumbach, deceased, requires that any claimant to the funds deposited into the registry of the court establish his or her right thereto by proving to the satisfaction of the court *the liability of the Estate of Ann Margaret Baumbach, deceased*. The complaint in interpleader was filed by plaintiff against “Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased;”. (Clk. Tr. p. 2)

The action filed in the Superior Court of the State of California for the County of Los Angeles by Katherine Kumm and Mary J. Sweeney as plaintiffs, and the judgment obtained therein was against the defendant Bettie J. Brown, as Special Administratrix of the estate of Ann Margaret Baumbach, deceased.”

Bettie J. Brown was the Special Administratrix of the estate of Ann Margaret Baumbach, deceased, for

whose benefit the sum of \$25,000.00 was deposited into the registry of the United States District Court by the Travelers Indemnity Company, plaintiff herein.

It is recited in the verified answer and cross-complaint of appellees that "on the second day of July, 1965, cross-defendant Bettie J. Brown was appointed Special Administratrix with general powers of the Estate of Ann Margaret Baumbach, deceased, in an action now pending in the Superior Court of the State of California for the County of Los Angeles, being Number SO P 8643, and ever since said time said cross-defendant Bettie J. Brown has been and now is the duly appointed and acting Special Administratrix with general powers of the above referred to estate." (Clk. Tr. p. 8)

The cross-complaint further alleges that appellees have filed creditor's claims against said estate for the damage described in the cross-complaint, and that "said Special Administratrix with general powers has heretofore rejected said claims against said estate." (Clk. Tr. pp. 8-9)

Appellants have filed an action in the District Court of the State of New Mexico and received their judgment therein in which appellants as plaintiffs named "Katherine A. Kumm and *Mary J. Sweeney, administratrix of the estate of Ann Margaret Baumbach, deceased*" as the sole defendants.

The judgment recites that "the defendant Mary J. Sweeney is the administratrix of the estate of Ann Margaret Baumbach, duly appointed for such purposes by the Probate Court in the State of California,

that process herein has been duly served upon the defendants in full compliance with the terms of the New Mexico Non-Resident Motorists Statute, but notwithstanding such service of process these defendants have failed to appear and are in default, a certificate of default having been filed in this cause by the Clerk of this Court.” (Clk. Tr. p. 98).

It is respectfully submitted that Mary J. Sweeney has never had any connection with the Estate of Ann Margaret Baumbach, deceased, nor has she acted either as Special Administratrix or as Administratrix thereof.

The *service* of the New Mexico summons and complaint on Mary J. Sweeney as well as the *default* entered against Mary J. Sweeney as Administratrix of the estate of Ann Margaret Baumbach, deceased, prevented the *estate* from *interposing a defense* to such action, and makes the New Mexico judgment a nullity as a claim against the estate of Ann Margaret Baumbach, deceased, in the *instant* action which would entitle appellants to distribution of the funds deposited in the registry of the United States District Court on behalf of Bettie J. Brown, as Special Administratrix with general powers of the estate of Ann Margaret Baumbach, deceased.

The estate of Ann Margaret Baumbach has never been served.

Appellees urge consideration of the following issues presented by this appeal:

- A. The New Mexico judgment shows on its face that the court did not obtain jurisdiction over the California estate or its administratrix.

1. An "estate" can neither sue nor be sued.
Lazar vs. Lazar Estate, 208 C.A. 2d 554;
Bright Estate vs. Western Airlines, 104 C.A.
2d 827.

A decedent's estate is not a person or entity,
and cannot be sued.

Vonchina vs. Turner Estate, 154 C.A. 2d 134.

2. Since all property of a decedent goes into
possession of the administrator, he is a *neces-*
sary party to all suits affecting it.

Harwood vs. Marye, 8 Cal. 580;

Hill vs. Westbrook, 95 C.A. 2d 599;

Miller & Lux vs. Katz, 10 C.A. 576;

Where a party is sued as administrator, the
complaint must allege the appointment of
an administrator, and that the party sued
was acting in that capacity, otherwise the
judgment would not be binding on the estate
of the intestate.

Barfield vs. Price, 40 Cal. 535;

Lyttle vs. Fickling, 72 C.A. 2d 383.

- B. The *estate* of Ann Margaret Baumbach, de-
ceased, did *not* submit itself to the jurisdiction
of the New Mexico Court under the provisions
of Sec. 21-3-16 of the *New Mexico Statutes*.

1. Sec. 21-3-16 of the *New Mexico Statutes* is
quoted verbatim in a footnote of Appellants'
Opening Brief at page 26. The section pro-
vides that a non-resident submits "*himself*
or *his personal representative*" to the juris-
diction of the New Mexico courts, if he oper-

ates a motor vehicle upon the highways of that state.

The administrator of an estate is the representative of the heirs and legatees of the decedent, and not the "personal representative" of the decedent.

An executor is the agent of the heirs and devisees, representing them as a trustee.

Bryan Estate, 99 C.A. 113;

Cole Estate, 124 C.A. 2d 615.

It is respectfully submitted that the administrator of an estate appointed in a foreign jurisdiction where the property of the decedent is located, does not submit himself to the jurisdiction of the New Mexico courts, either expressly under the applicable statute, or by implication.

- C. A plaintiff intending to file an action against the administrator of an estate must sue in the jurisdiction where the administrator was appointed by a court of competent jurisdiction, subject to the laws under which the administrator must act.

An administrator is subject to the jurisdiction and authority of the court which appointed him, and must account to the court for any matter affecting the administration of the estate and the assets thereof which he holds as an officer of the court and as a quasi-trustee for the heirs and devisees. *Both* the original complaint in interpleader and the New Mexico judgment recite

that probate proceedings are pending in the state of California.

It is respectfully submitted that any party intending to establish a claim against the estate of Ann Margaret Baumbach, deceased, must do so under the jurisdiction of the Superior Court of the State of California for the County of Los Angeles, and pursuant to the laws of the state of California applicable to claims against estates.

As such, a claimant must *plead* in his action that a claim was duly presented to the administratrix.

Rupp vs. Kahn, 246 C.A. 2d 188.

Probate Code Sec. 707.

If the claim is rejected, an action thereon *must* be filed within three months thereof, or it is forever barred.

Sec. 714 of the *Probate Code* reads in part as follows:

“When a claim is rejected by . . . the administrator . . ., written notice of such rejection shall be given by the . . . administrator to the holder of the claim, . . . and the holder of the claim . . . must bring suit in the proper court against the . . . administrator within three months after the date of service of such notice if the claim is then due . . . ; *otherwise the claim shall be forever barred.*”

- D. The jurisdiction of the court which rendered the judgment is open to inquiry and is subject to

collateral attack at any time, notwithstanding the full faith and credit clause of the federal constitution.

A judgment is entitled to full faith and credit only if rendered by a state court having jurisdiction of the parties and the subject matter. Where lack of jurisdiction is shown, the judgment will be denied enforcement.

Riley vs. New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885;

Williams vs. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577.

If the court of a sister state is without jurisdiction over the person of the defendant, the judgment is of no force in California.

Commercial Factors vs. Kurtzman, 131 C.A. 2d 133;

Britton vs. Bryson, 216 Cal. 362;

Taylor vs. Taylor, 192 Cal. 71.

If lack of jurisdiction over a defendant is disclosed on the face of the judgment roll, a judgment against him is a nullity and is subject to collateral attack.

The Traub Co. vs. Coffee Break Service, Inc., 66 A.C. 377, 379.

As appears from the original complaint in interpleader filed against Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, the New Mexico judgment is defective for each of the reasons hereinabove cited, and by reciting that the probate proceedings are pending in

the state of California, and by further reciting the wrong person as administratrix, the judgment shows a defect in service of summons and complaint, even if the Non-Resident Motorists Statute were to permit service upon the administratrix of an estate pending in California.

For the foregoing reasons, it is respectfully submitted that appellants have not established in the instant action any claim to the funds deposited herein.

II

Appellees Have Established Their Claim to the Fund.

As stated above, it is incumbent upon claimants under the Interpleader Act to establish a claim against the Estate of Ann Margaret Baumbach, deceased, in whose behalf the funds were deposited in the registry of the United States District Court.

After a claim, filed by appellees against the estate of Ann Margaret Baumbach in the probate action in the State of California, was rejected by the Special Administratrix with general powers, an action was filed by appellees in the Superior Court of the State of California for the County of Los Angeles resulting in a judgment *in personam* against the administratrix, in which, however, execution was limited to the funds on deposit in the United States District Court.

The action filed by appellees in the State of California against Bettie J. Brown as Special Administratrix involved as one of the issues the liability of one joint venturer against another joint venturer.

Specifically applicable to the issue whether a joint venturer is liable to another joint venturer in an action between them, New Mexico law and California law are identical in legal scope and conclusion.

The *New Mexico Guest Statute*, Section 64-24-1 of the New Mexico laws was held “unconstitutional” as applied to non-owner drivers.

In *Gallegos vs. Wallace*, (Supreme Court N. M. 1965) 398 Pac. 29, 982, the Court states at page 985 as follows:

“The legislature could have phrased the title in general terms so as to include non-owner drivers and such title would have been sufficient, but in this instance it was limited to *owners*. Under the rules by which we are governed in construing the constitutionality of such legislation the body of the act may contain only matter which is germane to the subject matter expressed in the title. We think a non-owner driver is clearly not germane to the subject matter expressly limited to the *owner* of the vehicle and that the statute, insofar as it limits the responsibility of non-owner drivers, contravenes the restriction of Sec. 16, Art. IV of the New Mexico Constitution.”

In *Perini vs. Perini* (Supreme Court N. M. 1958) 324 Pac. 2d 779, three brothers decided to travel to Denver, Colorado, in a car belonging to one of them, and to share expenses.

At page 780, the Court states as follows:

“The court below found as a conclusion of law that the appellants were not within the meaning of the New Mexico Guest Statute, 1953 Comp.

Sec. 64-24-1, but were engaged in a joint venture for a family purpose. There is ample evidence to support this conclusion and to set it forth in this opinion would be profitless."

In *Harris vs. Harfmann*, 113 C.A. 2d 615, the court held that an agreement by a person that he will pay for the gasoline and oil consumed on a trip which he and an automobile owner contemplate taking in the owner's automobile makes such person a passenger, and the owner is liable for injuries resulting from a failure to exercise ordinary care while driving on the trip.

In that case plaintiff and defendant were sisters, and the accident happened in New Mexico.

In *Whitmore vs. French*, 37 Cal. 2d 744, the Court states the rule that where the driver of an automobile receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence regardless of whether the trip is for the joint pleasure of the participants or is of a non-social nature.

All of the cases found refer to a *driver* and a *rider* without any reference to ownership.

The New Mexico statutes have no law providing for the vicarious liability of the owner.

In California the law is settled that an owner may sue a driver of his automobile for personal injuries due to negligence in spite of the provisions of Section 17150 of the *Vehicle Code*, which finds no counterpart in the *New Mexico statutes*.

In *Mason vs. Russell*, 158 C.A. 2d 391, an owner sued the driver of his own car for damages for personal injuries when the driver collided with the person of the owner pinning him against the side of a building.

From a judgment of dismissal, after the sustaining of a demurrer because of the provisions of Section 402 of the *Vehicle Code*, the Appellate Court reversed the judgment of dismissal and states at page 393 as follows:

“Necessarily, therefore, when the rights of third persons are not involved, such as in the present case where the action is by the owner against the permittee, an entirely different situation is presented, and hence the reason for the imputation of negligence ceases. In the case of *Ledgerwood vs. Ledgerwood*, 114 Cal. App. 538 (300 P. 144), a mother riding in a car which was the community property of herself and her husband and was then being driven by an adult son, sought damages for injuries as the result of his negligent operation of the car. In affirming the judgment in her favor the court held that “. . . where the injured party brings an action against the driver based upon the negligence of such driver, neither the fact that such injured party is the owner of the car, nor the fact that he is the employer or principal for whom the driver is acting, nor the fact that he is engaged in a joint enterprise with the driver, should defeat the action.” (P. 543)

The fact that the *Ledgerwood* case was decided prior to the addition of the particular phrase here in question is of no consequence in this proceeding. As the court noted in *Milgate vs.*

Wraith, 19 Cal. 2d 297, 300 (121 P.2d 10), the phrase, *shall be imputed to the owner for all purposes of civil damages*, ‘. . . can be interpreted in no other sense than to include actions by the owner against third persons. Indeed, that was undoubtedly the very purpose of the amendment. If the section were not so interpreted, the added portion would be meaningless . . .’ Again, in a somewhat similar situation the court stated in *Brown vs. Rowland*, 40 Cal. App. 2d Supp. 825, 827 (104 P.2d 138), ‘The obvious meaning of that section (402, subdivision [a]) is that the liability imposed on one who lends a car is for damage to the person or property of others. To say that he becomes liable for damages to himself would be absurd.’

The judgment is reversed.”

It is respectfully submitted that appellees have established a claim to the fund, i.e., *against the estate of Ann Margaret Baumbach, deceased*, in whose behalf the fund was established.

III

The Court Has Equitably Distributed the Funds Under the Jurisdiction and Upon the Authority of the Interpleader Act.

In its Pretrial Conference Order the Court rejected the contentions of the parties that it should try the claims of the parties *inter se* and dismissed the cross-complaints of appellants and appellees, requiring appellants and appellees to establish their right to the fund in the actions then pending in the courts of the State of California and New Mexico. (Clk. Tr. p. 86)

The precedents cited by appellants pertaining to the imputation of negligence of a joint venturer against a third party, fail to take into account that under the provisions of the Interpleader Act the claims of the parties *inter se* are not in issue, and the issue is confined to the establishment of a claim against the fund paid into the registry of the Court.

Appellants further fail to take into account that the New Mexico Statutes have no provision for the vicarious liability of the owner of an automobile.

In *Pan American Fire & Casualty Co. vs Revere*, 188 F.S. 474, the Court states the following conclusion pertaining to the issue now before this Court:

"In the event the aggregate of the verdicts should exceed the amount of Plaintiff's liability, the court reserves unto itself the task of apportioning the insurance proceeds in such manner as it deems just."

The purpose of the Interpleader Act was stated in *Consolidated Underwriters, etc. vs Bradshaw*, (U.S.D.C. Ark. 1955) 136 F.S. 395, involving an interpleader action by fire insurers against mortgagee and mortgagor, where the court states at page 397 as follows:

"Stated differently, an interpleader action normally proceeds in two phases. The first phase is the granting of the interpleader and the discharging of the plaintiff from further liability upon payment of the particular fund into the registry of the court. The second phase of an interpleader action is the determination of the claimants' rights *to the fund*. In regard to the second phase, each claimant occupies the position

of a plaintiff and must establish his claim by a preponderance of the evidence. See *Phoenix Mut. Life Ins. Co. of Hartford, Conn. vs. Reich*, D.C. Pa., 75 F. S. 886.

Again, there is a little doubt about the jurisdiction of the Court to determine the respective rights of the claimants to the fund in the registry of the Court, even though the claimants may be citizens of the same state. See *Callwood vs. Virgin Islands Nat. Bank*, 3 Cir., 221 F.2d 770, 779; *Old Colony Ins. Co. vs. Lampert*, D.C. N.J., 129 F. Supp. 545, 551; *Fidelity & Casualty Co. of New York vs. Wilson*, D.C. S.C., 105 F. Supp. 454, 457.

The real, and somewhat difficult, question of jurisdiction is whether the Court has the power to decide anything other than the rights of the claimants to the fund in the registry of the Court. In other words, the specific question is whether the Court has jurisdiction to enter a judgment or judgments in favor of one or more of the claimants against one or more of the opposing claimants, or whether the Court's jurisdiction is limited to the entry of a judgment merely distributing the fund in the registry of the Court to the claimant or claimants entitled thereto.

The Court is convinced that the latter statement is true, that is, *the jurisdiction of the Court is limited to the distribution of the fund, and that the Court has no power to enter separate judgments as between the claimants.*" (Emphasis added)

In *Preston Corp. vs. Raese* (D.C.W.Va. 1964) 236 F. S. 135, the Court states at page 144:

"... Likewise, in the state court, the right of Preston to prosecute and have jury trial of its

Cross-Claim for damages against Richard A. Raese, where personal service of process can be had on him, would seem to work to its advantage; whereas, whether such can be done in this court in an interpleader action is fraught with considerable uncertainty. *Liberty Oil Co. vs. Condon Nat. Bk.*, 260 U.S. 235, 244, 43 S. Ct. 118, 67 L.Ed. 232; *Bynum vs. Prudential Life Ins. Co.* (D.C.S.C.) 7 F. R. D. 585; 2 *Barron & Holtzoff*, Sec. 555, p. 138; *Liberty Nat. Life Ins. Co. vs. Brown*, 119 F. Supp. 920 (M.D. Ala. 1954). Indeed, in the recent case of *Metropolitan Life Ins. Co. vs. Enright* (S.D. Calif. 1964) 231 F. Supp. 275, it was held that there is no jurisdiction in interpleader to grant judgment in personam as to subject matter apart from that deposited in court, citing 48 C.J.S. Interpleader Sec. 47, p. 100, where the rule is stated:

“The court ordinarily should decree the rights of the parties only with respect to the particular fund or property which is the subject matter of the litigation.” ”

In *Atlantic Refining Co. vs. Continental Casualty Co.* (U.S.D.C. Penn.), 193 F. S. 478, the Court states at page 486:

“Interpleader does not affect the rights of the claimants or the rights of their respective claims *inter se*.”

It is respectfully submitted that the jurisdiction of this Court is controlled by the right of any particular claimant to the *fund*, and the action does not affect or involve the rights of particular claimants against each other or the merits of their respective claims against each other.

In *Metropolitan Life Ins. Co. vs. Enright*, 231 F.S. 275, decided by Judge Thurmond Clark in 1964 upon the issue whether the Court has a right to enter a judgment *in personam*, the court states, commencing at page 277 as follows:

“Counsel have cited no case — nor has the Court found authority — permitting a plaintiff thus to recover against a defendant in interpleader. The courts have in a number of cases held similar relief may not be granted as to a counterclaim.

In the case of *Lawyers Trust Co. vs. W. G. Maguire & Co.*, 2 F.R.D. 310 (D. DEL. 1942), the court specifically rejected the argument that as a court of equity it had power, in an action in the nature of interpleader, to grant complete relief to the parties. It pointed out, 2. F.R.D. at p. 313, the subject matter of a petition by one of the defendants was

‘* * * not in any sense any part of the subject matter of litigation, of which the Court is in the course of disposing.’

The court in the case of *United States vs. Coumantaros*, 146 F. Supp. 51 (S.D.N.Y. 1956) dealt, at p. 53, with the question of jurisdiction over the person:

‘The movant * * * has also questioned the jurisdiction of the court over its person. The interpleader, at least in the first stage and probably in the second stage, is an action *in personam*. However, movant has not come into court *in limine* to contest the validity of the service of process upon it. * * * By the instant motion, it submitted itself to the jurisdiction of the court, claiming the fund and

demanding that plaintiff be directed to pay the fund to it. The court has acquired jurisdiction of the movant at least *to the extent that its rights to the fund can be judicially determined.*' (Emphasis added)

The following cases, analogous to the one at bar, hold there is no jurisdiction in interpleader to grant judgment *in personam* as to subject matter apart from that deposited in court: *Stitzel-Weller Distillery vs. Norman*, 39 F. Supp. 182 (W. D. Ky. 1941); *Consolidated Underwriters of S.C. Ins. Co. vs Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1955); *Metropolitan Life Insurance Company vs. Chase*, 294 F.2d 500 (3rd Cir. 1961). See also 48 C.J.S. Interpleader Sec. 47, p. 100, wherein it is stated:

'The court ordinarily should decree the rights of the parties only with respect to the particular fund or property which is the subject matter of this litigation.' "

The precedents seem to establish that (1) in an action filed under the Interpleader Act the claims of the parties *inter se* are not in issue, and (2) that in the event the aggregate of the judgments exceeds the amount deposited in the registry of the Court, the Court "reserves unto itself the task of apportioning the insurance proceeds in such manner as it deems just."

It is respectfully submitted that the court correctly interpreted the provisions of the Interpleader Act and distributed the funds equitably among the parties.

While appellants argue at length the negligence

of the deceased Ann Margaret Baumbach, they refuse to consider any concurrent negligence by the driver of the Gautreaux automobile. Appellants do agree that the division of the funds must proceed on equitable principles (App. Op. Br. p. 28), but they fail to point out where the allocation of any particular sum under the court's computation is inequitable.

The plan submitted by the court to counsel was endorsed by appellants. After the court stated how the funds should be allocated and advised counsel that "I think the way I suggested is fair to everyone," counsel for appellants stated "*I am satisfied, your Honor.*"

In their *Conclusion* in Appellants' Opening Brief, appellants state that "the District Court should be ordered to take evidence *concerning the conflicting claims of the parties and to apply the applicable principles of law thereto.*" (p. 41)

It is respectfully submitted that appellants' position is directly contrary to all of the holdings of courts who have interpreted the Interpleader Act, and appellants apparently are not so much concerned with whether the District Court applied equitable principles, but are instead attempting by this appeal to obtain a ruling by this Court that the District Court should litigate the claims of the parties *inter se*.

At the same time, however, they request a ruling by this Court that "the District Court should be instructed to prohibit any attempt to relitigate or collaterally attack the final judgment of the New Mexico court." (App. Op. Br., p. 41)

The suggestion by appellants presents an anomaly in the sense that the District Court would be required to accept a default judgment at face value and at the same time relitigate the allegations made in the complaint in *that* action which is the basis of that judgment. The result would not only be inequitable, but it would defeat appellants' position that the District Court must give full faith and credit to the New Mexico judgment.

CONCLUSION

Appellants have failed to establish by the New Mexico judgment their claim to the fund which requires as a prerequisite a judgment against Bettie J. Brown as Special Administratrix with general powers of the Estate of Ann Margaret Baumbach, deceased, for whose benefit the fund was established, and further requires the filing of a claim against the estate before the filing of the action. By failing to serve, even under the New Mexico Non-Resident Motorists Statute, the representative of the estate, the judgment is a nullity as far as the estate of Ann Margaret Baumbach is concerned in the instant action. The estate of Ann Margaret Baumbach, through its legal representative, had no opportunity to defend the New Mexico action for the reason that the estate was not served with a copy of the summons and complaint. Such result is true regardless whether the Court applies Section 21-3-16 of the *New Mexico Statutes*, cited by appellants on page 26 of their Opening Brief, or its California counterpart, Sections 17451-17452 of the California Vehicle Code.

If this Court should hold, however, that a claim against the estate of Ann Margaret Baumbach in the instant action has been established by appellants, it is respectfully submitted that, for the foregoing reasons and in accordance with the above cited authorities, the District Court equitably distributed the funds under the jurisdiction and authority of the Interpleader Act.

Respectfully submitted,

ERIC A. ROSE

Attorney for Appellees

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ERIC A. ROSE

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APPELLANTS' OPENING BRIEF

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N O. 2 2 5 0 3
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR P. GAUTREAUX, etc., et al.,

Appellants,

vs.

KATHERINE KUMM and
MARY J. SWEENEY,

Appellees.

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the District Court, Central Division of California, in an action in interpleader, entered September 12, 1967, ordering distribution of certain funds deposited into the court by the plaintiff in interpleader. Notice of appeal was filed September 21, 1967.

The District Court had jurisdiction under the Interpleader Act, 28 U. S. C. §1335(a); see also Federal Rules of Civil Procedure, Rule 22. This Court has jurisdiction of appeal from final judgment, under 28 U. S. C. §1291.

QUESTIONS PRESENTED

1. Whether a court, exercising equitable jurisdiction of an interpleader action, may, consistently with the due process clause and established precedent, impose its subjective, arbitrary determination of what constitutes a "fair settlement" of conflicting claims of the litigants, without conducting trial or receiving evidence.

2. Whether a District Court is required to give full faith and credit to an in personam judgment of a state court having jurisdiction, by which one group of interpleader claimants is awarded money judgment against the opposing group, or if the court may refuse to give effect to that judgment because the defendant group defaulted in the state court, and instead allow those judgment debtors to share in the fund equally with (or in preference to) their own judgment creditors.

3. Where, of two groups of claimants to a fund in interpleader, one group is comprised of the victims of a tort and the other group is comprised of those who are vicariously liable for the tort, do the equitable principles controlling interpleader allow the latter group to assert their own tortious conduct as a basis for sharing the fund with the victims?

STATEMENT OF THE CASE

This is an action in interpleader.

The case was commenced by Travelers Indemnity Company, an insurance company, acting as stakeholder in connection with a certain automobile insurance policy it has issued to one of the appellees, Mary J. Sweeney. That policy had a limit of \$10,000 for each person and \$20,000 total. Travelers paid the full amount of the policy into the registry of the District Court and prayed for an interpleader of all claimants under the policy and the consequent discharge of Travelers [C. T. 2-5]. ^{1/}

Numerous claimants or potential claimants, including the present appellees and appellants, answered and cross complained, seeking adjudication of their claims to that fund [C. T. 6-41].

Thereafter, Travelers (the plaintiff) moved for and was granted summary judgment, absolving it of further liability and discharging it from the case, which order has become final [C. T. 42-46, 53-54 and 56-59]. All of the remaining defendants in interpleader, except the present appellants and appellees, have eventually been discharged from the case, upon disclaimer or stipulation, the

^{1/} Matters of Form: Volume 1 of the record, a transcript of the Clerk's papers as filed and docketed January 19, 1968, will be cited, in brackets, as "C. T. " (for Clerk's Transcript), followed by the page and, where appropriate, a colon and line numbers. The separate reporter's transcripts of proceedings which took place February 8 and August 28, 1967, will be cited within brackets as "R. T. ", followed by the date of the proceeding to which reference is made, the page, a colon and line numbers.

orders discharging them having become final without remaining materiality to this appeal [C. T. 82-83, 89-92 and 94-96].

Two separate open-court proceedings were held. On February 8, 1967, a number of the parties, including some of those subsequently discharged (as described above), appeared before the District Court, basically to determine the propriety of maintaining the action and the procedure for releasing a number of the minor claimants or potential claimants and also of withdrawing the fund on deposit and placing it in a trust account pending final judgment; all of this was worked out to the satisfaction of all concerned [R. T. 2/8/67, page 3, et seq.]. No evidence was taken.

Following the discharge of the remaining parties, the present litigants again appeared before the District Court on August 28, 1967. No evidence was taken at that hearing either, although the court did refer to a "xerox copy of the judgment of \$25,000 in the California State courts" [R. T. 8/28/67, 13-16 and 21-23]. The court also observed that it had "worked on this thing Sunday" [R. T. 8/28/67, 5:24-25]. The remainder of the hearing was devoted to an extended colloquy about arithmetic computation of various items the court was considering, primarily conducted between the court and counsel for appellees [pages 5-27]. At the conclusion, the court observed:

"[I]f the parties can stipulate to it, so much the better. The judgment to be entered in that amount. If you don't, I will still enter it. I think, it is a fair settlement. Is there any objection?" [27:13-17].

While appellees appeared perfectly satisfied, these appellants were not. The court, however, stated:

"I am going to make the order, you [appellees' counsel] draw the order. I want to get rid of this case. I can't keep these forever.

"In view of the special damages, which were miniscule certain value not in existence by the plaintiff (sic), I think it is a fair settlement. And, you can tell your counsel in New Mexico I feel it is." [R. T. 8/28/67, 28:13-19, emphasis added].

Judgment was thereafter entered, the court making extensive findings of fact and conclusions of law [C. T. 111-115]. In essence, the fund was divided:

To appellees, owner of the insured vehicle and joint venturers with the negligent driver: \$11,058.89;

To appellants, orphans and widower of the innocent deceased and victims of the negligence themselves: \$8233.70 [C. T. 114:15-25].

There being no evidence, either oral or documentary, introduced, there are no facts to be summarized for this Court. However, certain putatively factual matters have managed to find their way into the record, generally in the form of contentions of the parties or anomalous documents simply reposing in the file without further explanation. A few of these will be canvassed here.

Contentions will be recited only when they are the contentions of the appellees; although such a contention is, of course, still not evidence, it is safe to assert that the Court will hold appellees to their own contentions, so that they may be treated as factually established in appellants' behalf although not necessarily in appellees' own, self-serving behalf.

The controversy arose out of an automobile accident which occurred at 5 p.m. on July 15, 1964 on U. S. 66 near Gallup, New Mexico. One of the vehicles involved was appellees' automobile, a two-door Falcon driven by one Ann Margaret Baumbach, now deceased, and owned by the appellee Katherine Kumm, who was also a passenger in that car [C. T. 71:17-23]. Appellee Kumm, the driver and the others then riding in that car had previously entered into a joint venture, pursuant to which their driver was operating their car [C. T. 9:11-27].

As a direct and proximate result of the negligence of appellees' driver-joint venturer, appellees' automobile went out of control, skidded into the opposite traffic lane, glanced off an automobile driven by one of the since-discharged parties, turned over on its side and collided with a car driven by one of the appellants, in which the other appellants and their deceased wife and mother were riding [C. T. 10:2-18; 12:12-29; 72:30-32 and 71:26 - 72:2]. ^{2/} In that collision, appellees' driver-joint venturer

^{2/} For such additional import as it may have, the factual statements here recited, together with those in the previous record reference, were verified on the oath of one of the appellees [C. T. 14].

and one Elva Baumbach, a passenger and member of the joint venture were killed, as was Agnes Gautreaux, a guest passenger in appellants' vehicle who was respectively the wife and mother of the remaining appellants [C. T. 72:2-5]. The owner-joint venturer Katherine Kumm claimed to have sustained personal injuries [C. T. 72:5-9].

Appellee Katherine Kumm sued the estate of Ann Margaret Baumbach, the deceased driver-joint venturer, in the California state courts, on the ground that the deceased's negligence proximately caused injury and death to her passengers-joint venturers, in which suit the appellee Sweeney joined for damages for wrongful death (similarly caused) to her mother. The California Superior Court rendered judgment for both appellee Kumm and appellee Sweeney, and against the Baumbach estate, in the ostensible amount of \$25,000 for Kumm separately and \$10,000 for Kumm and Sweeney jointly. In actuality, however, that judgment was not a monetary, in personam judgment, since it went on to provide: "that execution of this judgment shall be limited to the funds now on deposit in the United States District Court, Central District of California, in an action entitled [giving the title of the present case]." Thus, it was in legal effect only an in rem order of the California Superior Court affecting the funds over which the District Court was exercising jurisdiction [C. T. 105-106].

Appellants brought suit for personal injury and wrongful death against the appellee Kumm and the administratrix of the estate of appellees' deceased driver, in the District Court of the

State of New Mexico for the district in which the accident occurred. Judgment was rendered against both defendants (appellees here) in the respective amounts: Appellant Edgar P. Gautreaux, as administrator, \$100,000; appellant Edgar Gautreaux, individually, \$5,000; appellants Shirley and Eloise Gautreaux, \$10,000 each, for a total of \$125,000.

That New Mexico judgment, unlike the California one, was a plenary, in personam judgment, in no way tied to the present case [C. T. 97-100].

SPECIFICATION OF ERRORS

1. It was manifest error for the District Court to impose its own subjective predetermination of what constituted a "fair settlement" of conflicting claims to the fund deposited into court, without conducting any trial or receiving any evidence, in contravention of due process requirements and established precedent.

2. It was manifest error for the District Court to refuse to give full faith and credit to a New Mexico judgment in favor of appellants and against appellees and to collaterally abrogate that judgment merely because appellees had failed to appear in the New Mexico action. This was aggravated by the District Court's apparent preference for a California judgment which did favor appellees, but to which appellants were not parties and which was not an in personam, plenary judgment, but rather an attempt by the state court to impose an in rem order on the fund deposited into the

District Court.

3. Even if recognized procedure had been followed and there had been a prior adjudication, it was violative of established principles of law and equity to allow appellees to set up their own tortious conduct as a basis for sharing in the fund, particularly where they were thereby allowed to profit by their own tort as against the victims of that tort.

ARGUMENT

I

ADVERSE CLAIMS OF LITIGANTS MAY CONSTITUTIONALLY AND PROPERLY BE DECIDED ONLY UPON EVIDENCE AND TRIAL, EVEN WHERE THEY ARE PRESENTED IN AN ACTION IN INTERPLEADER.

A. THERE IS NO CONFLICT IN THE RECORD AS TO THE FACT THAT NO TRIAL WAS CONDUCTED OR EVIDENCE TAKEN, THE DISTRICT COURT APPARENTLY BELIEVING THAT NONE WAS NECESSARY.

The District Court's method of "adjudicating" the conflicting claims of the litigants appears to be as unexplained as it is unprecedented and unjustified. The preamble to the findings of fact recites the receipt of evidence by the court and employs the bromidic language "the Court having duly considered the evidence . . ."
[C. T. 112:7-16], but the simple fact remains: There was no evidence and no trial within any conceivable meaning of those terms known to Anglo-American jurisprudence. The "detailed computation

in open court in the presence of counsel" described in the conclusions [C. T. 114:15-16] similarly adds little. The most infinitely detailed "computation" is a legal nullity if its components are non-evidentiary.

The record actually reveals that the court simply calculated out a batch of figures and informed appellants that they had a Hobson's choice between stipulating to accept those figures or having the court make a judgment on them [R. T. 8/28/67, 27-28]. However much -- and however understandably -- the trial court may have wanted "to get rid of this case", and however much the court may have sincerely believed that it was imposing "a fair settlement" by ultimatum, it misconceived its function. Litigation, it is submitted, is a process by which fair adjudications are reached, upon evidence and under the law. It is not a means of imposing settlements based on amorphous concepts of "fairness" upon contesting litigants, without so much as a doff of the hat to the fundamentals of due process.

Indeed, it would be working an unfairness to a skilled lawyer and judge to infer that the District Court even thought it was conducting a trial or hearing evidence. Instead, it seems clear from the record that the court was under the impression -- probably because the unfamiliar realm of interpleader was involved -- that conflicting claims were before the court to be "settled" rather than

adjudicated. 3/ That is an understandable error, but it is still an error.

The Supreme Court has held -- during its most recent term -- that a proceeding in interpleader is controlled by the principles of equity and cannot be employed to "strip truly interested parties of substantial rights."

State Farm Fire & Casualty Co. v. Tashire (1967),
386 U. S. 523, 536, 18 L. Ed. 2d 270,
87 S. Ct. 1199, 1206.

As it has been similarly stated:

"Interpleader does not affect the rights of the claimants or the merits of their respective claims inter se. Moore's Federal Practice, 2d ed., vol. 3, par. 22.07, pp. 3021-3022."

Atlantic Refining Co. v. Continental Casualty Co.
(D. C., W. D., Pa. 1960),
183 F. Supp. 478, 486 [6].

3/ It should be noted that the appellees played a not-inconsiderable role in misleading the court. The purported nature of the proceeding upon which the court acted was a "Notice of Motion for Disposition of Funds on Deposit" [C. T. 101, Dr., R. T. 8/28/67, 3:20]. This is a strange and wondrous procedural animal, for which appellants have found neither authority nor precedent. It was an attempt to short-cut trial by a proceeding infinitely more summary than mere summary judgment.

B. THERE IS ABUNDANT AUTHORITY FOR
 THE PROPOSITION THAT THE RIGHTS
 OF CONFLICTING LITIGANTS CAN ONLY
 BE RESOLVED BY TRIAL, AND UPON
 EVIDENCE -- EVEN IN INTERPLEADER.

1. WHILE APPELLATE DECISIONS ON
 THE POINT ARE NOT ABUNDANT,
 INFERENTIAL AUTHORITY SUPPORTS
 APPELLANTS' POSITION.

There is something of a scarcity of federal appellate authority specifically holding that conflicting claims must be decided -- even in interpleader -- upon evidence and by trial, and not by ex gratia baby-slicing. It would appear that the lack of such authority has its origin in the uncommon perplexity of the legal researcher: All too often the most self-evident propositions are not litigated (and especially to the higher courts), because of the very fact of that self-evidence. However, there are certain indications in the cases.

The Second Circuit hinted broadly that the normal fact-finding processes are appropriate to an interpleader action, when it held that a particular legal theory urged by an appellant presented a meritorious issue which would have to be determined on remand, "but one which cannot be decided upon the meager record in that respect now before us. The record on this point merely contains assertions and counter assertions of the parties. The relevant facts should be found and given effect after adequate hearing on the remand."

Republic of China v. American Express Co.

(2nd Cir. 1952), 195 F.2d 230, 235.

That is an exact characterization of the record in the case at bar. Other appellate courts have not apparently been presented with the exact question of whether trial and evidence are necessary (at least so far as appellants can discover), but do seem to presuppose the necessity. For example, this Court dismissed an appeal in an interpleader action, on the ground that appeal was premature since trial had not yet been held, observing:

"No phase of this question had been tried on the merits. . . ."

Guerin v. Guerin (9th Cir. 1956),

239 F.2d 909, 913.

If judgment is not final because the trial has "not yet" been held, it seems to follow clearly that there must be a trial.

2. AT THE DISTRICT COURT LEVEL
THERE IS A PLETHORA OF RE-
PORTED DECISIONS IRRECONCILABLE
WITH THE CONCEPT THAT INTER-
PLEADER ACTIONS ARE NON-
EVIDENTIARY, NON-TRIAL PROCEED-
INGS.
-

Numerous cases have observed that interpleader is a two-stage matter; first, there is a preliminary determination (with plenary trial if necessary) of whether or not interpleader is appropriate and then, if that question is answered in the affirmative, there is a second, at-least-equally-plenary trial on the merits of

the claims. Typically, it is said that the claimants are left to "try" their claims before a trier of fact as in any other litigation.

Eg., Savannah Bank & Trust Company of Savannah v.

Block (D. C. S. D. Ga. 1959),

175 F. Supp. 798, 801;

Girard Trust Co. v. Vance (D. C. E. D. Pa. 1946),

5 F. R. D. 109, 114 [9].

Once that second stage is reached -- as it was in this case -- the claimants who remain after discharge of the interpleading plaintiff each become plaintiffs as against the other; they "occupy the position of a plaintiff" and must prove their cases.

Reconstruction Finance Corporation v. Aquadro

(D. C. W. D. Pa. 1947),

7 F. R. D. 406, 409 [3].

The determination of those claims "must await determination at the trial of the issues as to the rights and priorities of the respective claimants."

Poland v. Atlantis Credit Corporation

(D. C. S. D. N. Y. 1960),

179 F. Supp. 863, 868.

Literally innumerable cases could be cited in which the courts have made reference to such familiar characteristics of trial as "offer of evidence", testimony of "competent witnesses" and the like, but the point seems clear. Almost without recognizing any need for discussion, the courts have uniformly treated trial of factual and legal issues in interpleader cases as being entitled to

the same dignity as trial of such issues in any other general framework.

C. WHATEVER THE STATE OF PRECEDENT, THE CONSTITUTION PROHIBITS EXPROPRIATION OF PROPERTY WITHOUT TRIAL OR EVIDENCE -- EVEN IN INTERPLEADER.

Even without the guidance of those earlier decisions, hypothesizing the question as though it were one of first impression, there is another obstacle to prohibit a judge's summary imposition of that which he subjectively and arbitrarily regards as "a fair settlement" upon interpleader claimants. That obstacle is the due process clause of the Constitution.

Procedural due process is not some mere nicety or matter of grace.

" 'The history of American freedom is, in no small measure, the history of procedure.' "

In Re Gault, 387 U. S. 1, 20-21, 18 L. Ed. 2d 527,
87 S. Ct. 1428. ^{4/}

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which

^{4/} Quoting the concurring opinion of Mr. Justice Frankfurter in Malinski v. People of State of New York (1945), 324 U. S. 401, 414, 89 L. Ed. 1029, 65 S. Ct. 781.

defines the rights of the individual and delimits the powers which the state may exercise."

Ibid.

" . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.' "

Ibid.

There is no suggestion in the Fifth Amendment to the effect that a person may be deprived of property without due process of law -- just as long as the deprivation takes place in an action in interpleader. Therefore, it may safely be asserted that appellants were entitled to due process of law before their proprietary claims to the fund involved were "settled".

As a minimum, due process guarantees to any person the right to a day in court which includes "as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel."

In Re Oliver (1948), 333 U.S. 257, 273,
92 L.Ed. 682, 68 S. Ct. 499.

"[D]ue process requires as a minimum . . .
a public trial after reasonable notice . . . a right to
examine witnesses against him, call witnesses on
his own behalf, and be represented by counsel."

In Re Murchison (1955), 349 U.S. 133, 134,
99 L.Ed. 942, 75 S. Ct. 623.

The lack of "fair hearing" and the introduction of some
evidence constitutes a failure to accord "even the minimal standards
of due process."

Turner v. Louisiana (1965), 379 U.S. 466, 471-2,
13 L.Ed.2d 424, 85 S. Ct. 546;

Thompson v. City of Louisville (1960),
362 U.S. 199, 206, 4 L.Ed.2d 654,
80 S. Ct. 624.

The question is not "the sufficiency of the evidence" but, as
presented in the case at bar, "whether this [judgment] rests upon
any evidence at all."

Thompson v. City of Louisville, supra,
362 U.S. at 199;

Cf., Shuttlesworth v. City of Birmingham (1965),
382 U.S. 87, 95, 15 L.Ed.2d 176,
86 S. Ct. 211.

Therefore, the action of the District Court, in dispensing with the rights to call and examine witnesses, to offer testimony and to have judgment rest only upon evidence -- and instead presenting appellants with an arbitrary figure and the ultimatum to stipulate or else -- cannot be tolerated under our constitutional social compact. Beyond doubt, the District Court did realize the import of its acts, nor did it intend to act unconstitutionally. But the Constitution prohibits mistaken and well-intended deprivations of due process, and appellant courts will not engage in over-nice calculations as to how much unconstitutionality occurred or what frame of mind prevailed. A victim of an inadvertent, unintended violation of the Constitution is still entitled to relief.

II

TO THE EXTENT THAT THE COURT BELOW
UTILIZED THE ONLY POTENTIAL EVIDENCE,
THE STATE-COURT JUDGMENTS, IT FAILED
TO GIVE THEM THE EFFECT TO WHICH
THEY WERE LEGALLY ENTITLED.

Admittedly, there were two documents which found their way into the record, copies of the New Mexico and California judgments, which might have served as evidentiary support for the judgment. Even putting aside the not-inconsiderable fact that neither judgment was offered or received in evidence (but just somehow lodged), two things are manifest: 1) that the court did not give any effect whatsoever to those judgments, and 2) that when the legally-required effect is given to those judgments it will be entirely

contrary to the result reached below.

A. IT IS SELF-EVIDENT THAT THE
COURT DID NOT GIVE EFFECT TO
THE JUDGMENTS.

1. IN DIVIDING THE FUND, THE COURT
FIXED A RATIO OF 11 TO 8 IN
FAVOR OF APPELLEES, WHILE THE
JUDGMENTS FAVORED APPELLANTS
BY THE PROPORTION OF 4 TO 1.
-

In the first place, the District Court could hardly have been giving effect to those judgments when it computed its proportions in carving up the fund. The New Mexico judgment, in favor of appellants, was for an amount approximately four times the amount of the California judgment in favor of appellees. Thus, if there were to be any pro rata disposition of the funds, based on the judgments, it would patently be at a rate of 4-1 in favor of appellants over appellees. The distribution, however, was in fact at a ratio of 11-8 in favor of appellees! Manifestly, then, the District Court gave absolutely no consideration to those judgments in establishing the distribution.

2. THE EFFECT OF THE JUDGMENTS WAS THAT APPELLANTS WERE ENTITLED TO RECOVERY AGAINST APPELLEES, WHEREAS THE COURT HELD APPELLEES WERE ENTITLED TO SHARE APPELLANTS' CLAIM TO THE FUND.

The second aspect of the court's failure to give effect to the judgments is even more clear -- and even more incomprehensible. Under the New Mexico judgment, appellants were entitled to recover against appellees (appellee Kumm personally and appellee Sweeney in a representative capacity). Under the California judgment, appellees were not entitled to any recovery against appellants, but only to recovery against third parties, if anyone. ^{5/}

Despite this, the District Court allowed appellees to share in the partial fund which was available to satisfy appellants' claims against those self-same appellees. In short, the judgment debtor was allowed to share part of the judgment creditor's claim. And not only to share, but to share better than 50-50!

In view of that posture of the case, it would test the credulity of this Court to suggest that the District Court was really giving any effect to those two judgments. In fact, the whole thing has something of an Alice in Wonderland aspect to it. It seems clear, thus, that the judgments played no evidentiary role in the decision

^{5/} Actually, the California judgment did not entitle appellees to recovery against anybody, but only sought to make a state court adjudication of how the United States District Court should divide a fund; the California Superior Court only awarded appellees a judgment in rem. (Please see sub-section B, infra.)

below.

B. THE COURT SHOULD HAVE GIVEN
RES JUDICATA EFFECT, AND FULL
FAITH AND CREDIT, TO THE NEW
MEXICO JUDGMENT.

Appellants hasten to add that they do not contend that the court was correct in failing to give effect to these judgments. Quite the contrary, they not only should have been given effect; the law required that they receive full faith and credit. The Res Judicata Act and the pertinent authorities make it clear that federal courts must give full faith and credit to state-court judgments; it is a mandatory proposition, with nothing permissive or discretionary about it.

Res Judicata Act, 28 U. S. C. §738

(third paragraph). 6/

"Full faith and credit means that a judgment in one state must be given the full effect it is given by the law and usage in the state of its origin. And, too, the judgments of a state must be given the same full faith and credit in federal courts."

Nelson v. Miller (9th Cir. 1952),

201 F.2d 277, 279 [1];

6/ "[The] judicial proceedings [of any state, territory or possession] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Accord: Williams v. Murdoch (3rd Cir. 1964),
330 F.2d 745, 751 [2] (and authorities
collected).

Therefore, the failure to give effect to those two judgments was not merely a failure to base the decision below upon evidence; it was also a failure to follow the legal requirements as to what effect should be given to that particular type of evidence. At the very least, then, the party who recovered judgment against the other party should be entitled to satisfy that judgment in preference to the judgment debtor's claim, and without reference to the fact that the judgment debtor had some claim against non-parties. Furthermore, even if there were to be some sharing in the fund, at a minimum it would have to be in proportion to the entitlement established in the state courts.

But the necessary effect of those judgments does not even stop at that minimum. In fact, the true nature of the judgments is such as to completely oust the claim of the appellees and to entitle appellants to the entirety of the fund.

Appellants' New Mexico judgment is a plenary, in personam judgment, entitling appellants to recover dollars from appellees. It is not tied in with or restricted to any other litigation, procedure, or fund. Thus, it is the most familiar and also the most encompassing type of judgment recognized in the law.

On the other hand, appellees' California judgment was nothing of the sort. It appeared to be an in personam money judgment, but that was only the form of words employed; the substance

was quite different. The law, of course, looks to substance rather than form.

Young v. Higby Co. (1945), 324 U.S. 204, 209,

89 L. Ed. 890, 65 S. Ct. 594;

Electric Bond & Share Co. v. Securities and Exchange

Commission (1938), 303 U.S. 419, 440,

82 L. Ed. 936, 58 S. Ct. 678;

First National Bank of Portland v. Dudley

(9th Cir. 1956), 231 F.2d 396, 402.

In substance, the California judgment was merely some sort of an in rem order purporting to determine appellees' rights to recover from the fund on deposit in the registry of the District Court in this case -- and nothing more. In contrast to the New Mexico judgment, which conclusively adjudicated rights of recovery between the parties to this action, the California judgment did not conclusively adjudicate rights against anybody -- let alone against any party to this action. It was, purely and simply, an attempt by the state court to decide the issue pending in the United States District Court. That, it is submitted, the California court could not do.

True, the state courts are the proper forum for determining substantive rights and liabilities of litigants in tort actions, as the New Mexico court did but the California court did not. Once such an in personam adjudication is made, as it was in New Mexico, it becomes *res judicata* and will be accepted by the federal courts. But it is one thing to decide substantive, personal rights and

liabilities of tort litigants, and quite another thing to attempt to make an in rem adjudication of a controversy over which the federal courts have already taken jurisdiction. Therefore, the one judgment which was entitled to res judicata effect should have been given that effect and the other judgment, being entitled to no effect on the parties, should have received none.

C. THE FACT THAT APPELLEES FAILED
TO CONTEST THE NEW MEXICO ACTION
IS IMMATERIAL.

The District Court appears to have predicated its cavalier treatment of the New Mexico judgment on the ground that the New Mexico judgment was "a default" [R. T. 8/28/67, 28:8-9], and therefore the California judgment was somehow "better" and the New Mexico judgment subject to being brushed aside.

Virtually at the outset of the "hearing" of August 28, the court announced its predetermination of how the fund should be divided, in surprising terms:

"Let me give you -- my idea is to pay out the specials first. Then, with the balance left, I think, it is only fair to divide it three ways. One to Katherine Kumm, another to the Gautreauxes to satisfy all of the Gautreauxes because that was a default judgment over there and their specials are relatively minor to

Katherine Kumm's specials. ^{7/} But, they are important to be taken care of and so on." [R. T. 8/28/67, 9:3-9, emphasis added].

Thus, not only was the solemn judgment of a state court summarily rejected, but also -- and worse -- the widower and orphans were somehow to be penalized for the fact that appellees did not choose to answer the New Mexico lawsuit. It seems bad enough to treat a judgment of a court with jurisdiction as somehow a "second class" judgment just because the defendant didn't happen to want to appear in that court; it seems even worse (and more illogical) to penalize the state court plaintiff for the defendant's failure to appear and to reward the defaulting defendant. That would be intolerable in any case, as a matter of judicial and public policy. When it results in punishing bereaved survivors, it becomes doubly unthinkable and almost vicious in its import.

This dwelling upon the default nature of the New Mexico judgment was totally misplaced. Certainly it would be an exercise in questionable judicial policy (and morality, for that matter) to reward a litigant for boycotting proceedings and allowing default to be taken, to say nothing of punishing a plaintiff because the defendant chose to default.

^{7/} Admittedly, it may sometimes be cheaper -- in terms of out of pocket "specials" -- to bury a wife and mother than to nurse some broken ribs back to health. To assume, however, that therefore the loss is the lesser is to take a myopic and medieval view of the law of damages.

Where a state court has subject matter jurisdiction, its default judgment is perfectly entitled to full faith and credit and to res judicata effect and may not thereafter be collaterally attacked -- any more than a judgment rendered after contested trial may be. The fact that a litigant, deliberately or through negligence, fails to litigate the case and suffers a default does not entitle that litigant to collaterally attack the default judgment in a later proceeding.

Midessa Television Co. v. Motion Pictures For
Television (5th Cir. 1961), 290 F.2d 203,
204-5 [4-6]; cert. denied 368 U.S. 827.

As the New Mexico court noted, it acquired jurisdiction under that state's non-resident motorist act. 8/ That substituted service under such statutes results in jurisdiction which is just as "good" as any other form of jurisdiction has been settled for more than forty years.

Hess v. Pawloski (1927), 274 U.S. 352, 356-7,
71 L.Ed. 1091, 47 S. Ct. 632;

8/ §21-3-16, New Mexico Statutes Annotated, 1953 Compilation:

"Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from: . . . (2) the operation of a motor vehicle upon the highways of this state; (3) the commission of a tortious act within this state"

Held constitutional in Clews v. Stiles (9th Cir. 1960), 303 F.2d 290, 292; Cf. §64-24-3 of the same code, relating to service of process on the Secretary of State, and 64-24-4 prescribing the procedure to be followed.

See 5 UCLA Law Review 198, 199-201 and authorities
collected.

III

SINCE APPELLEES' POSITION CONSTITUTES
A PROFITING FROM THEIR OWN WRONG, IT
WOULD BE ERROR TO ALLOW THAT PROFIT
EVEN UNDER PROPER, CONSTITUTIONAL
PROCEDURES AND EVEN IF THERE WERE
NOT A PREVIOUS, CONTRARY JUDICIAL
DETERMINATION.

The discussion in the two preceding sections is believed to be determinative. With procedural unconstitutionality appearing and a denial of full faith and credit, there seems little basis for further dispute.

However, in the interests of orderly judicial administration (to say nothing of fundamental fairness), it is worthwhile to pay some attention to the basic nature of appellees' position.

Even apart from the prior adjudication aspect of the case, there would be little virtue in remanding the case for the purpose of following proper procedures, without at the same time giving appropriate directions to prevent a judgment which is substantively obnoxious to established principles of law and equity.

A. PRINCIPLES OF EQUITY CONTROL
THE DETERMINATION OF ADVERSE
CLAIMS IN INTERPLEADER.

A proceeding in interpleader is an equitable action and controlled by the principles of equity.

State Farm Fire & Casualty Co. v. Tashire, supra;

Texas v. Florida (1939), 306 U.S. 398, 405, 412

83 L.Ed. 817, 59 S. Ct. 563;

Schlemmer v. Provident Life & Acc. Ins. Co.

(9th Cir. 1965), 349 F.2d 682, 684-5 [3].

Among other equitable propositions which flow from that fact, the following are established:

1) A suitor in the equitable action for interpleader "must do equity and come into court with clean hands".

Great American Insurance Company v. Bank of

Bellevue (8th Cir. 1966), 366 F.2d 289, 293;

2) The court has inherent power to apply the Interpleader Act as a remedial statute, so as not to result in a hardship or injustice.

Austin v. Texas-Ohio Gas Company (5th Cir. 1955),

218 F.2d 739, 745-6 (and see authorities collected); and, finally,

3) A tortfeasor may not employ the equitable protections of interpleader "against the consequences of [the tortfeasor's] own wrong".

Holcomb v. Aetna Life Insurance Company

(10th Cir. 1955), 228 F.2d 75, 82,

cert. denied 350 U.S. 986.

B. THOSE EQUITABLE PRINCIPLES ARE
VIOLATED BY THE JUDGMENT BELOW.

Of the three equitable principles of interpleader just canvassed, there is one which is: 1) the most pertinent to the case at bar; 2) the most frequently and forcefully enunciated by the courts; and 3) a sort of synthesis of the entire nature of equity.

That is the particularization of the "clean hands doctrine" in the form of "the rule that 'a tort-feasor cannot obtain protection in an action in the nature of interpleader against the consequences of his own wrong.' "

Pan American Fire & Casualty Company v. Revere

(D. C. E. D. La. 1960), 188 F. Supp. 474,

481-2 [8].

In fact, the very district court from which this appeal is taken has, in other cases, examined the proposition that the law should allow no man to profit by his own wrong, terming it an old, established, familiar maxim of jurisprudence applicable, among other things, in interpleader actions involving claims to insurance proceeds. For example:

Manufacturers Life Ins. Co. v. Moore

(D.C. S.D. Calif. 1953), 116 F. Supp. 171,
174;

Prudential Ins. Co. of America v. Harrison

(D.C. S.D. Calif. 1952),
106 F. Supp. 419, 424.

In the case at bar, the appellees are not only seeking recovery notwithstanding the fact that they lack clean hands; the very gravamen of their claim is an assertion of their own tortious liability, and an attempt to recover because of that liability. That, it is submitted, no court of equity will suffer.

In effect, appellees came before the court asserting, in the first instance, a claim against their own driver. In that, however, they would be balked by the guest legislation applicable in both pertinent jurisdictions (please see *infra*, §2). Therefore, they were required to establish a business relationship, a form of partnership between themselves and the deceased driver, in order to make a *prima facie* case against her estate. Having accomplished this, however, they have decided that they don't care to bear the burdens of that partnership, but only its benefits, and to assert claims paramount to those victimized by the partnership (the appellants), notwithstanding the partnership's fault.

In other short words, they had to establish their own participation in the fault in order to be in court in the first place, but nevertheless sought to recover against those who suffered from that fault.

1. APPELLEES ARE NO BETTER OFF,
WHICHEVER JURISDICTION'S LAW
IS CHOSEN.

Before examining the effect of that incredible proposition -- regrettably adopted by the District Court, implicitly, in its judgment -- it is necessary to examine briefly the question of choice of law and the effect of the choice which is made.

The District Court gave no indication of what jurisdiction's law was being applied. It was, of course, necessary that the law of some state apply since, under Erie R. Co. v. Tompkins (304 U.S. 604), no amorphous federal common law applies; the Erie rule applies in insurance-benefit interpleader actions.

Ettlinger v. Connecticut General Life Ins. Co.

(9th Cir. 1949), 175 F.2d 870, 872 [1].

It seems probable that there are only two states whose law is likely to be chosen: New Mexico (the place of the tort) or California (the place of appellees' domicile and the place where the insurance carrier chose to commence the interpleader action).

Traditionally, the place of the tort governs.

Slater v. Mexican Nat. R.R. Co. (1904),

194 U.S. 120, 126, 48 L.Ed. 900,

24 S. Ct. 581.

Thus, if the historically-tested rules for choice of law are applied, the District Court would be required to apply New Mexico law. Admittedly, however, there is a trend away from simple application of the place-of-the-tort rule in favor of more modernistic rules of

"grouping of contacts" or "center of gravity".

Eg., Reich v. Purcell, 67 A. C. 560, 562,

63 Cal. Rptr. 31, 432 P. 2d 727;

Babcock v. Jackson, 12 N. Y. 2d 473, 191 N. E. 2d 279,

95 A. L. R. 2d 1 (annotated at 95 A. L. R. 2d 12,
et seq.).

Fascinating though that academic debate may be, it is really unnecessary to decide whether this Court should assume that the Supreme Court's ruling in Slater is still "good law", or will predict that the Court will eventually adopt the more "modern" tests. Whichever is adopted, there is much to be said for applying New Mexico law. Apart from being the place of the tort, New Mexico is also the state in which all parties were present and in which the rights of both sides of this appeal were adjudicated in the state courts. California, on the other hand, has only the happenstance contact of appellees' domicile, plus the fact that appellees litigated against third parties in this state -- and did so only as an appendix to the interpleader action. Thus, even under a grouping of contacts test, it would appear that New Mexico law might well apply.

Once again (as will appear shortly) even that doesn't make much difference, since the appellees appear clearly to be barred from unjustly enriching themselves by means of their own tortious conduct under the laws of either state.

2. UNDER THE LAW OF EITHER
STATE, APPELLEES HAD TO
ESTABLISH THEIR OWN PARTICI-
PATION IN THE NEGLIGENCE IN
ORDER TO MAKE A PRIMA FACIE
CASE.

Whichever law is applied, the wrongful participation of appellees is unassailably established.

Appellee Kumm was a passenger in the death car (driven by Ann Margaret Baumbach), whereas she and Appellee Sweeney both claim in the shoes of another rider, the deceased Elva Baumbach. Therefore, at the outset, neither could claim as against the fund -- which, it must be remembered, insured against the liability of their driver, Ann Margaret Baumbach -- under the guest statutes of either state. Neither California nor New Mexico allows recovery for personal injury to or wrongful death of a guest in a motor vehicle sustained as a result of the negligence of the host-driver.

California Vehicle Code §17158; 9/

9/ "No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driven on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver. "

New Mexico Statutes Annotated §64-24-1 and 2; 10/
See Patton v. LaBree, 60 Cal. 2d 606,
35 Cal. Rptr. 622, 387 P. 2d 398;
Gallegos v. Wallace, 74 N. M. 760,
398 P. 2d 982, 984.

Therefore, since the only conceivable recovery which appellees could obtain was against the fund of their own driver's insurance, it was necessary for them to somehow wiggle out from under that statutory ban. They did so by asserting that they were engaged in a joint adventure with their deceased driver and succeeded in persuading the California court of that joint venture so as to take them out of guest status and allow them recovery -- since a member of a joint venture may recover against a negligent driver who is a member of that venture.

10/ §64-24-1, New Mexico Statutes Annotated, 1953 Compilation:

"No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

a. BY ESTABLISHING A JOINT
VENTURE WITH THE NEGLIGENCE PARTY, APPELLEES
ESTABLISHED IMPUTATION
OF THAT NEGLIGENCE TO
THEMSELVES.

However, that "solution" to one of their problems merely left them impaled upon the other horn of a dilemma, since a joint venturer's negligence is imputed to other members of the joint venture whenever the rights of third parties are at issue. This, of course, was the basis upon which the New Mexico court was able to render judgment against the appellee Kumm; the deceased driver's negligence was thus imputed to her -- as established by a final, conclusive judgment (please see discussion, supra).

Furthermore, by establishing that joint venture, appellees established themselves out of court, since the negligence of their joint venturer-driver became their negligence insofar as third persons are concerned. Under New Mexico law:

"If two or more persons unite in joint prosecution of a common purpose, under such circumstances that each has the authority to control the means to execute such purpose, the negligence of one is chargeable to the other; and this applies if they use an automobile as a conveyance for their joint purpose."

Silva v. Waldie, 42 N. M. 514,

82 P.2d 282, 286;

Quoted and followed: Knudson v. Boren

(10th Cir. 1958), 261 F.2d 15, 19 [7].

Under California law, the same result obtains. The California Supreme Court has held to be well established the general rules that:

" 'The relationship of joint venturers is that of a mutual agency, akin to a limited partnership' [citation], and that the negligence of one joint venturer . . . acting in connection with the joint venture is imputed to the other joint venturers. [Four citations]. "

Leming v. Oilfields Trucking Co. ,

44 Cal.2d 343, 350 [3 and 4],

282 P.2d 23, 27;

Cf. , Buck v. Standard Oil Co. ,

157 Cal. App.2d 230, 239, 321 P.2d 67, 73.

Thus, both appellees were wrongdoers in their self-asserted capacity as joint venturers.

b. THE POSITION OF APPELLEE
KUMM IS DOUBLY TAINTED,
SINCE THE DRIVER'S NEGLIGENCE IS ALSO IMPUTED TO
APPELLEE AS OWNER-PRINCIPAL.

The claim of appellee Katherine Kumm -- to whom the District Court awarded a sum of money greater than the aggregate awarded to the entire Gautreaux family -- is doubly untenable. She

was not only charged with the wrongdoing as a joint venturer-partner; on top of that, her position was equally tainted by her status as an owner-passenger.

The Tenth Circuit has held this to be true under New Mexico law.

"The authorities are in general accord that a person riding as an occupant in his own auto, which is being used for a purpose in common with the driver, is presumed to have the right to control the vehicle and direct the movements of the vehicle, and the negligence of the driver is imputed to the owner. 38 AmJur., Negligence, §249. The acceptance of this rule was indicated by the Supreme Court of New Mexico"

Knudson v. Boren, supra, 261 F.2d at 19; citing
Silva v. Waldie, supra, 82 P.2d at 286.

California's position is at least as clear concerning imputation of liability to an owner-occupant for whose benefit the trip is being conducted. The California statute (as it read at the time of the occurrence and the trial) ^{11/} provides:

^{11/} The statute was amended at the 1967 session of the California Legislature in several particulars, some immaterial to this case and some putatively significant. It was provided, however, that: "This act does not confer or impair any right or defense arising out of any death or injury to person or property occurring prior to the effective date of this act."

California Statutes, 1967, Chapter 702, §14.

The effective date of the California statutes adopted at the
(Continued)

"Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

California Vehicle Code §17150.

When the passenger provides the car and the driver is operating it for the passenger's benefit, the relationship of principal and agent exists between driver and owner as a matter of law, and therefore the driver's negligence is imputed inexorably.

Souza v. Corti, 22 Cal.2d 454, 461,

139 P.2d 645, 648;

Glanville v. Cannick, 182 Cal. App.2d 514, 517,

6 Cal. Rptr. 175, 177.

C. THUS, NEITHER APPELLEE HAD STAND-
 ING TO ASSERT A CLAIM IN A COURT
 OF EQUITY ARISING OUT OF HER OWN
 LIABILITY.

The case, therefore, presents an almost unbelievable

11/ (Continued) 1967 session of the California Legislature was
 November 8, 1967. The injury and death involved in the case
 at bar occurred in 1964.

picture. Two suitors in equity come before the court in the posture of having been required to establish their own liability for the accident on which the case is based and nevertheless claiming the right to prevail over the appellants whose only "fault" was that of being in the path of the negligently-operated juggernaut of the decedent, whose negligence the appellees have actually embraced.

It is bad enough to see a court of equity giving serious consideration to such a claim. It is even more incredible to find that appellees Kumm and Sweeney have been preferred by the District Court over appellants -- appellants who are not even charged with any wrongdoing, and who have been judicially determined to be free of wrongdoing.

It is bad enough, it is submitted, for Appellee Sweeney, personal representative of the self-proclaimed joint venturer of the tortfeasor who widowed and orphaned the appellants, to walk away from the court with some \$1700 in insurance proceeds which belong to the appellants and which she claimed on the cynical basis that **she** was entitled to be reimbursed by her own insurance for her own negligence. It is infinitely worse and infinitely more incredible to observe the Appellee Kumm leaving the court with \$9200 -- more than the whole Gautreaux family put together -- when Kumm is triply tainted: 1) as the joint venturer of the wrongdoer; 2) as the owner in control of the death-dealing vehicle; and 3) as the judicially determined tortfeasor under a final judgment.

In contrast, the three appellants, who were nothing but victims, were awarded the grand total of some \$8200 for the loss

of their wife and mother, burial expenses and the personal injuries which each of them sustained. Even if the court had been applying law and evidence, rather than "fair settlement", it would seem that such a concept of fairness would be difficult to justify. Under the law and the principles of equity concerning the setting up of one's own wrong, it seems even more unjustifiable.

Lest there be any mistake, it should be pointed out that the law does not only frown on litigants' capitalizing on their own direct liability. Even a litigant to whom liability is imputed is barred from such an unconscionable position; when even a vicariously-liable litigant comes into court, "his hands ought not to have the blood of the dead or injured . . . upon them, when he thus invokes the impartial powers and processes of the law." Or, phrased somewhat less colorfully, "It is contrary to the policy of the law for [a litigant] to profit by the wrong [of the one in whose shoes he stands]."

Witt v. Jackson, 57 Cal.2d 57, 71-72 [16],

17 Cal.Rptr. 369, 377 [17],

366 P.2d 641, 649 [17];

Lovette v. Lloyd, 236 N.C. 663,

73 S.E.2d 886, 891-2;

Brown v. Southern Ry. Co., 204 N.C. 668,

169 S.E. 419, 420.

A converse rule, it is recognized, results in unjust enrichment of the one to whom the wrongdoing is imputed, at the expense of the third party, a form of unjust enrichment which the law (and

certainly equity) will not countenance. For example, in addition to the cases just cited:

Kesler v. Pabst, 43 Cal.2d 254, 256-7,
273 P.2d 257, 258-259.

If there ever was a judgment which exuded the very essence of unjust enrichment, it is this one.

CONCLUSION

For the reasons stated, the judgment below must be reversed. Upon the remand, the District Court should be ordered to take evidence concerning the conflicting claims of the parties and to apply the applicable principles of law thereto; provided, however, that the District Court should be instructed to prohibit any attempt to relitigate or collaterally attack the final judgment of the New Mexico court, to which full faith and credit must be given. Furthermore, the District Court should be directed to take only such proceedings and grant only such relief as might not have the effect of allowing appellees to assert a claim based upon their own wrong, whether that wrong be direct or imputed to them under their own theories of the case.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in black ink, reading "Edward L. Lascher", written over a horizontal line.

EDWARD L. LASCHER

N O. 2 2 5 0 5

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APPELLEE'S BRIEF

I

JURISDICTION

On July 27, 1964, Appellant entered pleas of guilty to three counts of a nine-count criminal indictment charging Appellant with nine separate violations of Title 18, United States Code, Section 2113(a). On August 25, 1964, the Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sentenced Appellant to imprisonment for 17 years and 300 days on each of the three counts, sentence to begin and run concurrently.

On April 1, 1966, Appellant filed a motion to vacate his sentence, pursuant to Title 28, United States Code, Section 2255. Appellant alleged that after he was taken into custody he requested

to be permitted to consult with his counsel, but his requests were ignored. He claimed that during the interrogation which then followed he made self-incriminating statements. He also asserted that his pleas of guilty were based upon a Government agent's promise that he would receive a sentence of ten (10) years or less if he would plead guilty [C. T. 2]. ^{1/} A full hearing on the motion, at which Appellant was present and represented by counsel, was held before Judge Stephens on May 23 and 24, 1967. On June 15, 1967, Judge Stephens, by minute order, denied Appellant's motion [C. T. 179] and on June 30, 1967, entered Findings of Fact, Conclusions of Law and Judgment to that effect [C. T. 180].

On June 16, 1967, Appellant, by letter, requested a "New Trial or Rehearing". ^{2/} The request was denied by Judge Stephens on June 30, 1967. ^{3/} On July 10, 1967, Appellant filed a Motion for New Trial, pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure, seeking to re-open the hearing to permit Appellant to present additional evidence or, in the alternative, to have the judgment vacated and his sentence set aside [C. T. 222]. On July 31, 1967, Judge Stephens entered an order denying this motion [C. T. 236]. Notice of Appeal was filed by Appellant on

^{1/} "C. T." refers to Clerk's Transcript.

^{2/} See C. T. 236.

^{3/} Ibid.

September 7, 1967 [C. T. 269]. 4/ Leave to appeal in forma pauperis was granted by this Court on January 5, 1968. 5/

The District Court had jurisdiction of the motion, pursuant to Title 28, United States Code, Section 2255. This Court has jurisdiction on this appeal pursuant to Title 28, United States Code, Sections 1291 and 1915.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255, provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

4/ Appellant's counsel had initially filed a Notice of Appeal on July 10, 1967 [C. T. 210]; however, Appellant notified the Clerk of the Court that he wanted the notice withdrawn and it was struck from the file on July 27, 1967 [C. T. 216 and 218].

5/ Appellant's request to appeal in forma pauperis had previously been denied by Judge Stephens on August 30, 1967 [C. T. 239].

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5/ Appellant's request to appeal in forma pauperis had previously been denied by Judge Stephens on August 30, 1967 [C. T. 239].

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

" . . .

" . . .

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

III

STATEMENT OF FACTS

Appellant was arrested on June 30, 1964, by Special Agents of the Federal Bureau of Investigation and taken before a United States Commissioner where he was arraigned on a complaint with one count, a violation of Title 18, United States Code, Section 2113(a) [C. T. 168]. Appellant was then taken to the Police Administration Building, booked and held as a federal prisoner [C. T. 168].

On either July 1, or July 3, 1964, ^{6/} Appellant was interrogated by two members of the Los Angeles Police Department and Special Agent Robert H. Morneau of the Federal Bureau of Investigation [R. T. (2) 63]. ^{7/} During the interrogation, Appellant confessed to the commission of a number of bank robberies [R. T. (2) 67]. A tape recording of this interrogation was made, but, in August 1965, following an established procedure, the tape was erased [C. T. 168].

On July 20, 1964, Appellant appeared before Judge Stephens but at the request of Appellant's retained counsel the proceedings were continued until July 27, 1964 [C. T. 168]. On July 27, 1964, Appellant, with retained counsel, Richard P. Byrne, again appeared

^{6/} The parties stipulated that the exact date was in dispute [C. T. 168].

^{7/} "R. T. (2)" refers to Reporter's Transcript of the Hearing of Appellant's 2255 motion on May 23 and 24, 1967.

before Judge Stephens and entered pleas of guilty to three of the nine counts of the indictment against him.

As previously noted, Appellant filed a motion to vacate his sentence on April 1, 1966 [C. T. 2]. Thereafter, beginning in June 1966, Judge Stephens held a number of pretrial conferences, at which Appellant was present and was represented by court-appointed counsel, Jack A. Dahlstrum, in an attempt to classify all the claims that Appellant wished to present at the hearing as a basis for any relief. ^{8/} On March 28, 1967, Appellant, acting in propria persona, served fifty-five requests for admissions upon Appellee [C. T. 119]. Appellee failed to answer within the time specified by Appellant. ^{9/} On May 17, 1967, Appellant filed

^{8/} See R. T. (1), Reporter's Transcript of pretrial conferences held on June 20th and August 15, 1966, and January 11th and February 2, 1967.

^{9/} Appellee's failure to answer was based, partially, on the ground that the requests came from Appellant rather than from his counsel. Counsel for Appellant had indicated in February 1967 that he would file interrogatories and requests for admissions with appellee in February, 1967:

"THE COURT: . . . So how soon can you get your interrogatories? Can you get those by, say, the 17th of February?

"MR. DAHLSTRUM (counsel for Appellant):
I will.

"THE COURT: All right. Any interrogatories and requests for admission? (emphasis added).

"MR. DAHLSTRUM: Served and filed by February 17th?

"THE COURT: Yes, we don't have any hearing on that date. That's just the date for filing.

(Continued)

a Motion for Summary Judgment on the basis that Appellee had, by its failure to answer Appellant's requests for admissions, admitted the matters contained in the requests [C. T. 160]. Judge Stephens denied the motion, 10/ and Appellant, counsel for Appellant and counsel for Appellee then stipulated that Appellee would admit seven of the requests but would deny or object to the others [C. T. 168].

Judge Stephens entered a Pretrial Conference Order and Stipulation on May 23, 1967 [C. T. 168] stating that all matters which might affect the validity of the criminal judgment against Appellant would be considered at the hearing on Appellant's motion to vacate his sentence and that Appellant would have the burden of proof on all issues. Appellant raised six issues of law or fact that might affect the validity of the judgment:

1. Were the pleas of guilty of petitioner in the criminal proceeding, voluntarily made and free from coercion and/or wrongful inducement?

a. Was petitioner's right to counsel violated by the interrogation conducted in the Police Administration Building on either July 1 or July 3, 1964, said date being in dispute, and

9/ Continued:

"MR. DAHLSTRUM: Yes, I understand."
[R. T. (1) 69].

10/ The motion was denied by a Minute Order entered on May 17 or 18, 1967 [C. T. 162 and 163]. On October 30, 1967, Judge Stephens, in a memorandum order denying Appellant's application to appeal in forma pauperis, set forth in detail the basis for his denial of Appellant's motion.

were his pleas of guilty influenced or induced thereby?

b. Were any promises made to petitioner by Special Agent Robert H. Morneau, Jr., which influenced or induced petitioner to plead guilty?

c. Was there a threat made to petitioner at the time of his pleas of guilty by Assistant United States Attorney Michael Balaban, such as to have coerced petitioner to enter pleas of guilty?

d. Was petitioner's right to remain silent violated during interrogation by law enforcement officers while petitioner was in custody? If petitioner's right to remain silent was violated during such interrogation, were the pleas of guilty induced or influenced thereby?

2. Is the sentence based upon a pre-sentence report which is so erroneous as to render the sentence invalid as being a lack of due process of law?

3. Was petitioner mentally competent, i. e., able to understand the nature of the proceedings against him and to cooperate with counsel in his defense at all stages of the criminal proceeding?

4. Was petitioner adequately represented by counsel at all stages of the criminal proceeding?

5. Were petitioner's pleas of guilty induced by a combination of inducements, or of inducements and coercion, or of inducements, coercion and inability to understand the proceedings against him and to cooperate and assist his counsel, or of all

of these and the inadequacy of counsel?

6. If petitioner's right to remain silent, right to be represented by counsel, or right to due process has been violated, did this preclude the Court from having jurisdiction to accept petitioner's pleas of guilty [C. T. 168]?

IV

SPECIFICATION OF ERRORS

Four questions emerge from the argument presented in Appellant's opening brief:

1. Did the trial court err in denying Appellant's motion to deem the matters contained in his request for admissions admitted for failure to answer?

2. Did Appellant sustain his burden of proving that his pleas of guilty were induced by promises of leniency by a Government Agent?

3. Did Appellant sustain his burden of proving that his pleas of guilty were induced by the existence of an illegally obtained self-incriminating statement?

4. Did Appellant sustain his burden of proving any of the other contentions he raised in the trial court?

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DEEM THE MATTERS CONTAINED IN APPELLANT'S REQUEST FOR ADMISSIONS ADMITTED.
-

1. RULE 36 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT APPLICABLE TO PROCEEDINGS BROUGHT PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 2255, AND APPELLEE WAS NOT OBLIGATED TO REPLY TO THE REQUESTS.
-

A motion under Section 2255 is, in reality, comparable in all respects to a plea which, prior to the effective date of Section 2255, traditionally would have been in habeas corpus. Appellant's rights are no greater, or less, than they would have been if he had proceeded in habeas corpus. See Hill v. United States, 368 U.S. 424, 427 (1962). It is, therefore, necessary to determine whether Rule 36 is applicable in proceedings brought in habeas corpus. Rule 81(a)(2) expressly provides that the Federal Rules of Civil Procedure are not applicable to habeas corpus proceedings, other than on appeal, unless they come within the statutory exception clause of that rule. This principle was succinctly stated in Burleson v. United States, 205 F. Supp. 331 (W.D. Mo. 1962), rev'd other grounds, 340 F.2d 387 (8 Cir. 1965):

"Section 2255 is the last section of Chapter 153 entitled Habeas Corpus of the United States Code. It is expressly provided in Rule 81(a)(2) that the Rules of Civil Procedure, with exceptions not here important, are not applicable to proceedings in habeas corpus. We think it clear from its history and its purpose that Section 2255 is a 'proceeding in habeas corpus' within the meaning of Rule 81(a)(2), 28 U.S.C.A. Cf. Holiday v. Johnston, 313 U.S. 342, 353, 550, 61 S. Ct. 1015, 85 L. Ed. 1392 (1941), and see United States ex rel. Goldsby v. Harpole, 5 Cir. 249 F.2d 147, 420 (1957), (cert. denied 361 U.S. 850, 80 S. Ct. 109, 4 L. Ed. 2d 89)." 205 F. Supp. at 334.

This Court recently considered the applicability of the Federal Rules of Civil Procedure to habeas corpus proceedings, Wilson v. Harris, ^{11/} 378 F.2d 141 (9 Cir. 1967). In that case, the Court was specifically concerned with Rules 26 and 33. Appellant therein, a warden of a state prison, contended that the applicability of Rules 26 and 33 to habeas proceedings was limited by Rule 81(a)(2). In construing Rule 81(a)(2), the Court stated:

"The Federal Rules of Civil Procedure relating to discovery interrogatories are applicable

^{11/} Hereinafter referred to as the Wilson case.

in habeas proceedings provided both of the following conditions are satisfied: (1) discovery interrogatories in habeas proceedings are not otherwise provided for in statutes of the United States, and (2) the discovery practice in habeas proceedings, prior to the effective date of the Federal Rules of Civil Procedure, conformed to the then discovery practice in actions at law or suits in equity. " 378 F.2d at 143.

The Court then found that Appellee had been unable to show that discovery procedure had been used in habeas proceedings prior to September 16, 1938. ^{12/} It then held that the second condition of Rule 81(a)(2) could only be satisfied by a showing that:

" . . . prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practices in actions at law or suits in equity. " 378 F.2d at 144.

Finding that Appellee had not satisfied this condition, the Court held that the discovery procedure of the two rules was not available in habeas proceedings.

The issues before the Court in the instant case, therefore,

^{12/} The date upon which the Federal Rules of Civil Procedure became effective.

are whether Rule 36 is part of the discovery procedure of the Rules and, if so, whether Appellant has satisfied the conditions of Rule 81(a)(2), as construed in the Wilson case. Appellee respectfully submits that Rule 36, like Rules 26 and 33, is part of the discovery procedure and that Appellant has failed to meet the conditions.

The discovery procedure of the Federal Rules is set out in Part V, which is entitled "Depositions and Discovery". Rules 26 through 37, inclusive, are listed under that part. Further, Rule 37, entitled "Refusal to Make Discovery; Consequences", refers to Rule 36. From this statutory scheme, it is apparent that Rule 36 is an integral part of the discovery procedure.

Appellant has never, either in his opening brief or in any of the papers filed before Judge Stephens, cited any instances in which discovery procedure was used in habeas proceedings prior to September 16, 1938. The burden to make such a showing is, and has been, on Appellant and the failure to meet this burden precluded him from making use of the discovery procedure of Rule 36 in the Section 2255 proceeding. Therefore, Appellee was not obligated to reply to Appellant's requests for admissions and the trial court properly denied Appellant's motion.

2. IF APPELLEE WAS OBLIGATED TO REPLY TO APPELLANT'S REQUESTS FOR ADMISSIONS, THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION WAS WITHIN ITS DISCRETION AND APPELLANT'S RIGHTS WERE NOT PREJUDICED BY THE DENIAL.
-

Appellant contends in his opening brief that the trial court was required to enter summary judgment in his favor when Appellee failed to make a timely response to his requests for admission. Assuming that Appellee was required to respond, it does not follow that the trial court was required to grant Appellant's motion. The trial court in its discretion, had authority to determine that the failure to make a timely response was not by itself sufficient reason to grant summary judgment. This principle was stated in Mossman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2 Cir. 1966):

"It appears well settled that a failure to respond to a request to admit will permit the District Court to enter summary judgment if the facts as admitted are dispositive. . . . But the District Court is not required to do so. Under compelling circumstances the District Court may allow untimely replies to avoid the admission. . . .

[Citations omitted.] Finman [author of The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962)] contends that the admission in the case of an untimely reply should not be

automatic. [71 Yale L. J. 433, notes 238-9] Finman, however, also submits that there should be limits and we agree. We would impose such limits when the delay has prejudiced the other party." 358 F.2d at 688.

Appellant's only allegation of prejudice resulting from the trial court's denial of his motion is that the ruling surprised him and thereby precluded him from calling witnesses that he could have called. The record below shows, however, that the trial court denied Appellant's motion for summary judgment, which was based on Appellee's failure to respond to the request for admissions, on May 17, 1967 [C. T. 162], six days prior to the hearing. Additionally, the Pretrial Conference Order and Stipulation, made it clear that the Court would not consider all the requests admitted, and that in the absence of proof on any particular issue, it would find against Appellant [C. T. 168]. ^{13/} The record also shows that when the hearing began on May 23, 1967, Judge Stephens waited until the Appellant had read the Order before proceeding [R. T. (2) 4].

There is nothing in the Reporter's Transcript to indicate that Appellant, after he had had an opportunity to go over the pretrial Order, indicated to Judge Stephens that he needed more time to prepare for the hearing or that he needed to call additional

^{13/} See, in particular, parts I and V of the Order.

witnesses. On the contrary, as illustrated by the following two excerpts, the transcript shows that Judge Stephens gave Appellant ample opportunity to present any evidence that he might have.

"MR. DAHLSTRUM: Mr. French . . . will have to make a decision now with the backdrop of the advise I have given him as to whether he desires to testify further or not.

"THE COURT: All right, that's up to you, Mr. French. . . .

"THE COURT: Well, now we have all these various things in the pretrial order which you have raised now, and now is your time to be heard on all of them. That's the importance of this. . . . you are representing yourself and have Mr. Dahlstrum's assistance. You will have to make these decisions. So proceed as you see fit." [R. T. (2) 34 and 35].

"MR. DAHLSTRUM: The petitioner rests.

"MR. TALCOTT: (counsel for Appellee)
The Government at this time would move the court
. . . .

"THE COURT: Wait a minute. Do you concur with that, Mr. French? You rest now? Go talk to Mr. Dahlstrum, if you wish.

(Whereupon small conference was held.)

"THE PETITIONER: Yes, sir.

"THE COURT: You rest?

"THE PETITIONER: Yes, sir." [R. T.

(2) 59].

On this record, it is clear that Appellant's rights were not prejudiced by the refusal of the trial court to deem the matters requested admitted.

B. APPELLANT DID NOT SUSTAIN HIS
BURDEN OF PROVING THAT HIS
PLEAS OF GUILTY WERE INDUCED
BY PROMISES OF LENIENCY BY A
GOVERNMENT AGENT.

Appellant contended in the court below that his pleas of guilty were induced by a promise of an agent of the Federal Bureau of Investigation [Special Agent Morneau] that he [Appellant] would only receive a sentence of 10 years in prison, or less. ^{14/} At the trial, the burden was on Appellant to prove that the agent had made such promise. See United States v. Wiggins, 184 F. Supp. 673, 676 (D. C. D. C. 1960) and Smith v. United States, 339 F.2d 519, 526 (8 Cir. 1964). The only evidence Appellant offered to support his contention was his own testimony that he entered the guilty pleas so that he could take advantage of the agent's promise

^{14/} Appellant admits, however, that prior to accepting his pleas, the trial court questioned him concerning whether any particular sentence had been promised him in exchange for his pleas of guilty and that he denied receiving any such promise [R. T. (2) 56-58].

[R. T. (2) 57-59]. Appellant's testimony was contradicted by Agent Morneau who denied making any promises to the Appellant [R. T. (2) 69].

It is apparent that there was a serious conflict in the testimony of Appellant and Agent Morneau. In ruling on this matter, the trial judge clearly indicated that he chose not to believe Appellant [C. T. 180, particularly page 8 therein]. In a collateral attack upon a judgment, as in other proceedings, credibility of the witnesses is for the trier of facts to decide. See Bloom v. United States, 272 F.2d 215, 223 (9 Cir. 1959), cert. denied 363 U. S. 803 and McDonald v. Knapp, 373 F.2d 549, 558 (6 Cir. 1967).

The trial judge's finding is supported by other evidence in the record. It is not contested that the alleged promise was made, if at all, during the interrogation of Appellant by Agent Morneau in the Los Angeles Police Department Building. Agent Morneau knew that the interrogation was being recorded [R. T. (2) 65], but Appellant did not [R. T. (2) 33]. The tape recording of the interrogation was not destroyed until August, 1965 [C. T. 168], more than a year after Appellant had entered the pleas of guilty. Moreover, Appellant stated in his affidavit to his motion for the 2255 hearing that he had informed his attorney, Mr. Byrne, of the Agent's promise to him. Appellant failed to call Mr. Byrne at the 2255 hearing and failed to corroborate his own testimony in any way. The clear inference is that no promise was ever made to Appellant.

It is clear that there was more than sufficient evidence to sustain the trial court's conclusion that no promise of leniency was made to Appellant.

C. APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HIS PLEAS OF GUILTY WERE INDUCED BY THE EXISTENCE OF AN ILLEGALLY OBTAINED SELF-INCRIMINATING STATEMENT.

Appellant contended in the court below that his pleas of guilty were induced either by promises of leniency, supra, or alternatively, were the result of incriminating statements which were obtained from him in violation of his constitutional rights. For Appellant to prevail on this latter ground it is incumbent upon him to show more than the mere existence of illegally obtained evidence in the hands of the Government. See Norris v. Wilson, 378 F.2d 324, 326 (9 Cir. 1967), and Hardee v. Wilson, 363 F.2d 848, 849 (9 Cir. 1966). He must show that the guilty pleas were induced by the existence of the illegally obtained admissions. See Doran v. Wilson, 369 F.2d 505, 507 (9 Cir. 1966).

The only evidence tending to support Appellant's contention was his own testimony that if he had not confessed he would not have entered the pleas [R. T. (2) 30]. This statement is contradicted, however, by other testimony of Appellant that he entered the pleas so that he could take advantage of the alleged

deal ^{15/} [R. T. (2) 57-58]. Moreover, the other evidence in the case indicates that the pleas were not induced by the admissions. The evidence shows that the pleas were not entered until approximately 25 days after the admissions [C. T. 168], and that appellant was represented by retained counsel during this time [C. T. 2 and 27]. The evidence also shows that the appellant discussed his case, including the admissions, "at length" with his counsel [C. T. 27]. After all this, Appellant, with his counsel present, entered the pleas of guilty.

Further, Appellant offered no evidence that his pleas were based on fear of physical or psychological abuse. Rather he testified that he was never physically abused while in custody [R. T. (2) 42], including the time of his illegal interrogation [R. T. (2) 49].

Again, it is clear that there was more than sufficient evidence to sustain the trial court's conclusion that appellant's guilty pleas were not induced by the illegal admissions. See Doran v. Wilson, supra.

^{15/} Note, also, that in his supplemental affidavit in support of his 2255 motion, dated August 31, 1966 [C. T. 27] in paragraph 14, Appellant, under oath, states " . . . my pleas of guilty were induced solely upon the assurance and promise of the afore-mentioned agent of the Federal Bureau of Investigation [Special Agent Morneau], that I would receive a prison sentence of ten (10) years or less. "

D. THE OTHER ISSUES RAISED BY APPELLANT WERE ISSUES IN THE TRIAL COURT AND APPELLANT FAILED TO PRESENT ANY EVIDENCE ON THOSE ISSUES.

In addition to urging that the trial court committed three specified errors, the Appellant's opening brief also contends that the trial court erred in its findings that:

- (1) Appellant's guilty pleas were not coerced by threats by an Assistant United States Attorney; and
- (2) Appellant's sentence was not based on an erroneous pre-sentence report.

Appellant made a number of contentions in the trial court as a basis for setting aside his sentence. All of Appellant's contentions, including the alleged threats by an Assistant United States Attorney and the alleged erroneous pre-sentencing report, were included in the Pretrial Conference Order and Stipulation [C. T. 168]. At the hearing, the burden of proving his contentions was on Appellant. See Smith v. United States, supra. However, Appellant offered absolutely no evidence to show that he was threatened by an Assistant United States Attorney or that the pre-sentence report was erroneous. Appellant clearly failed to meet his burden of proof, and the trial court had no choice but to find

that Appellant's contentions were unfounded. 16/

VI

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE G. RAYBORN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

16/ Similarly, Appellant failed to offer any evidence to support his contention that he was mentally incompetent or that he was not adequately represented by counsel. The trial court had no choice but to find that those contentions were also unfounded.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George G. Rayborn
GEORGE G. RAYBORN

NO. 22506 ✓

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE,
SAN FRANCISCO, an unincorporated association,
PACIFIC MARITIME ASSOCIATION, an unincorporated
association, ILWU, an unincorporated labor union,
ILWU, LOCAL 34, an unincorporated labor union,
MATSON TERMINALS INC., a California corporation,
et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

APPELLANT'S REPLY BRIEF

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EXbrook 7-5288

Attorney for Appellant

FILED

SEP 11 1968

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS
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RUSSELL O. LAW,

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APPELLANT'S REPLY BRIEF

The factual statement with citations to the record appear in the
Appellant's Opening Brief, and will not be restated.

I. PRE-EMPTION HAS NO APPLICATION

Respondent's brief contends that LAW's brief raises asserted matters
which are within the pre-emption doctrine, and cites various decisions ap-
plying the pre-emption doctrine.

It is now established beyond a question that in any action in the courts
upon a collective bargaining agreement, that Congress did not intend exclu-
sive jurisdiction in the NLRB but to leave to the courts their normal
jurisdiction. This is the direct holding in Vaca v. Sipes, 369 U S. 171.

It is also the direct holding in a suit by an employee upon collective bargaining agreement in Smith v. Evening News Association, 371 U.S. 1957.

The doctrine of pre-emption has no application in this case.

II. COLLECTIVE BARGAINING AGREEMENT

In order to determine if there is a violation of the collective bargaining agreement, the nature and extent of the collective bargaining agreement must be determined by the court. The action is predicated upon the Master Agreement of Clerks, etc. of 1952, with supplements, Exhibit 1 in evidence. This agreement is the only known and disclosed written collective bargaining agreement in existence at the time of the matters involved here, to wit, late 1964 and early 1965. This agreement, pages 20-3, Section 21, covers the grievance machinery. Only awards of arbitration are purported to be conclusive or final. This agreement made in 1952 antedated the Labor Law decisions on grievance-arbitration procedure and it is therefore not constituted an exclusive remedy. Neither is there any provision barring remedies to the courts in any part of the contract.

Late in 1965 there was signed, and disclosed by circulation a new clerk's contract purporting to be effective from 1961. This contract, contrary to the 1952 contract, was drafted after the law developed on grievance-arbitration and it provides that the grievance-arbitration procedure is exclusive and must be exhausted before resort to the courts. This contract contains the provision known as Section 17.81 that permits grievance procedure against employees only for deliberate bad conduct or illegal stoppage of work.

The St. Sure deposition going into the collective bargaining agreement, Exhibit 3, shows the contention that although the 1952 agreement with its supplements was the only writings known or disclosed, there were various

practices and oral understandings that varied, altered and amended the disclosed written agreement of 1952. Not only did Mr. St. Sure testify that the agreements became effective and were changed upon an oral understanding, and it sometimes took months before the written wording could be agreed upon and the writing executed, but he also testified that awards and arbitration were not final but were changed from time to time or amended by mutual agreement of the parties (Ex. 3, pg. 6, 8-9), and this would often be done by the Coast Committee, an organization a creature of the contract.

There were no findings as to which or what contract was in effect at the times involved in this action but only general findings that there was a contract without reference to the writing.

A count in the complaint is one to determine what contract governed and if it were the disclosed written contract or the concealed secret oral agreements and practices in violation of the disclosed written contract that varied, altered and amended the disclosed writing.

III. HEARING WITHOUT NOTICE OR OPPORTUNITY TO APPEAR AND DEFEND.

There are two grievances involved in this matter and are set forth not only in the complaint, but the exhibits to the complaint consisting of the correspondence attempting to utilize the grievance-arbitration procedure on behalf of the plaintiff. LAW was not paid for the full eight hours that he worked on November 23, 1964, at the MATSON TERMINAL. He initiated the necessary steps by taking this pay shortage up through the dispatcher, in the ordinary course of such proceedings. He asked that this matter be heard by some steps in the grievance-arbitration procedure, and was never granted a hearing nor did the Union Local 34 who usurped the power of the statutory collective bargaining agent (the defendant ILWU) in all matters in

the San Francisco region concerning the clerks act in this matter. It was the defendant Local 34, not defendant ILWU, who elected and selected the employee members on the defendant Joint Port Committee. Although it appears without issue that the defendant ILWU, not defendant Local 34, who is the exclusive statutory bargaining agent for all ship clerks employed in the Port of San Francisco, this exclusive bargaining agent did not undertake to do anything in any part of this case.

While the plaintiff LAW's claim for pay shortage of November 23rd was still pending, the defendant Matson Terminal initiated a complaint against the plaintiff in December by filing a form with PMA and the defendant PMA, who through its employee Kucin, wrote the letter of December 3, 1964, to the defendant Local 34. It is on this employer's grievance that LAW first learned of any difficulty on January 13, 1964, when he was sent to the Local 34 hall where he met with the Union Local 34 committee who assured him it was no fault of his and that no blame would attach to him arising out of the incident.

It should be pointed out that it was the practice in most instances for matters to be taken up with the Union and only if formal written charges were filed by the former employer, through PMA, would the matter follow the grievance-arbitration procedure.

The evidence showed that there was a difference of understanding between the members of the Union Local 34 Committee as to what was said, or even the incident of October 23rd was involving the plaintiff. Robb, a member of the Union Committee, testified (Tr. 186) that LAW had stated exactly what had happened and that basically he was trying to follow the instructions of his supervisor and got confused somewhere along the line. He also testified (Tr. 187) that Mr. Hermann stated that he would present

the facts to the employers together with the extenuating circumstances and that it would be good for LAW, no doubt meaning that it would be represented, as Robb understood it, that LAW was carrying out the instructions of the supervisor as he understood them with the result that the longshoreman loaded the wrong cargo in the hold of the ship.

If the new contract which Campion, the business agent of the Local, testified was being applied prior to the disclosure and its signing, then of course only deliberate bad conduct of a clerk in his work or illegal stoppage would be any grounds for discipline.

LAW had understood the direction of his supervisor Harvey to load the conexes in the particular pile into the particular boat. This the longshoreman did with his lift carrying the cargo to the hook from which the cargo was loaded on the ship. It was LAW who discovered that it was loaded in the wrong ship and reported it to his supervisor who immediately corrected the error. This is certainly not deliberate bad conduct nor is it intentional work stoppage, the sole grounds of discipline.

Even the employer's representative Kucin testified that the provisions described in Section 17.81 (the new contract executed and disclosed in August of 1965) had been applied in the process of grievance for many years, and long before the LAW incident in 1964 (Tr. 240).

Mr. Kucin the PMA representative on the Joint Port Committee, testified that they acted solely upon the representations of the Union that LAW was guilty (Tr. 242-3). Kucin also testified (Tr. 245) that he knew of no prior complaint by any employer against LAW and that if one of the some one hundred employers in PMA did not want a particular clerk dispatched to them, they would have filed a complaint.

Mr. Kucin, the PMA employee and a member of the defendant

Port Committee for many years, (since 1954, Tr. 206) testified that there were two halls run by the Committee, one in Oakland and one in San Francisco and that a Union or book man, also designated a registered man, is dispatched for as long as the job lasts while a non-registered man, meaning one who has not been permitted to join the Union, is dispatched for one day only (Tr. 213). He testified that the normal procedure as to the social security man (that is a non-registered man not a member of the Union) his services are terminated -- that is he is no longer dispatched as a ship's clerk (Tr. 219). He testified (Tr. 220) that the Exhibit 14 (the W-2 forms showing LAW's address in Oakland on 57th Avenue) was available to both him and all members of the Committee and the Committee has access to all PMA record section information. He also testified that the new clerk's contract, Exhibit 2, was first distributed in 1965 (Tr. 221).

Mr. Kucin, with more than a decade of experience on the defendant Joint Committee prior to the LAW matter, testified that very few of the charges filed by PMA against employees resulted in dismissal (Tr. 231). He also testified there is a different rule applicable to the registered (that is Union members) and those who are not Union members (Tr. 231).

The plaintiff who relied upon and who looked solely to his ship clerk's employment for his livelihood for nine and one-half years is denied the right to further follow his livelihood by being dispatched as a ship clerk through the ship clerk's hiring hall as a result of this adjudication in the first step of his former employer's grievance, without notice, without an opportunity to present his defense or even to be heard. The kindest way to put it is that the Union in a few minutes' interview did not understand the facts, and did not care to take the trouble to learn, but proceeded contrary to their representations that they would represent him and concurred in the

employer's association action to forever bar Mr. LAW from his livelihood. It appears this is done because there is a different rule applied to non-union men, a different standard of punishment applied to non-union men and different representation because he was a non-union man. Even Kucin admits that the harsh penalty of barring a man from his employment is very rare and the minutes of the meeting show that the employers insisted upon cessation of further dispatch, not for an action of deliberate bad conduct in connection with employment or willful stoppage but for an unintentional act where LAW was attempting to carry out his supervisor's instructions as he understood them and permitted the longshoreman of the lift truck to move cones to the hook and from there be loaded in the hold; which mistake was obviously that of the superintendent and the longshoreman and not LAW. It is not grounds for punishment or discipline under the contract.

Thus in the first step of the grievance-arbitration procedure which is nonexclusive under the 1952 contract but which is exclusive under the new contract not reduced to writing or distributed until after this incident much later in 1965, did this star chamber procedure arise and LAW was tried in absentia without evidence and forever barred from his livelihood of nine and one-half years. He was not represented by the exclusive bargaining agent, defendant ILWU. He was sold out and doublecrossed by an elected Union Committee of defendant Local 34.

IV. THIS IS NOT A DISCHARGE BUT A BARRING FROM ANY EMPLOYMENT

Respondent's brief under statement of issues poises the question of an employer's right to discharge an employee. This particular statement begs the question. As a nonmember of the Union, and therefore not registered, Mr. LAW was dispatched only for one day at a time. He was dispatched but for one day on November 23rd. He completed the full day's

work. His dispatch ended. Were he a member of Local 34, he would have been dispatched for the entire loading and unloading of the S.S. Dant. There is no question of his discharge by any employer.

More than one hundred employers are members of PMA, and by the contract all employers must employ ship clerks through the two hiring halls in San Francisco. It is the punishment meted out in trial in absentia in violation of the contract and the denial of any grievance procedure or effective or good faith representation (or indeed any representation) by the exclusive bargaining agent (defendant ILWU) that resulted in this particular litigation. It was barring LAW from any further employment by any of the some hundred other employers of ship clerks in the Port of San Francisco. It is the punishment of preventing future dispatch to any of the some hundred other employers of ship clerks.

It was the failure of the exclusive bargaining agent, the defendant ILWU, to do anything that resulted in this damage.

Defendant ILWU is the exclusive collective bargaining agent for the ship clerks in the Port of San Francisco. It completely abrogated its duty and did not represent any phase nor was it involved in any way in LAW's matter. It did not even select the members of the Union Committee, who are elected by and solely by the book men, members of Local 34. It did not select or elect the employee representatives of the Joint Port Committee. In violation of the contract, which provides it shall be done by the defendant ILWU, the evidence shows it is done solely by Local 34 through election of its members for these employee representatives. It was this Local 34, not the exclusive bargaining agent, the defendant ILWU, that undertook to interview Mr. LAW for a few minutes at the Local 34 offices in San Francisco and who undertook to tell him that they would protect him and fight his cause.

It was the defendant Local 34's Committee who did not represent him at all but confessed him guilty and sat by idly while the employer members excluded LAW from his livelihood as a ship clerk for any future dispatch to any of the one hundred other employers of ships clerks in San Francisco.

There is a total failure of the exclusive collective bargaining agent, the defendant ILWU, to do anything in this matter or to act at all for it sat by and did nothing but purported to delegate all powers to a third person, the defendant Local 34. This, the exclusive statutory collective bargaining agent cannot do. No agent can delegate matters involving discretion or judgment or in whom is reposed trust or confidence without the consent of the principal. It is a matter where as here it involves any matter of discharge, skill or judgment, it cannot be delegated.

Repeated demands for resort to the grievance-arbitration procedure resulted in refusal whether it be the underpayment and wages in dispute or whether it be the trial in absentia without evidence and without notice.

The barring of LAW from his sole means of livelihood was not on a grievance by him. True, it was triggered by his asking for his shortage of pay. It was a grievance of the Matson Terminals through the defendant PMA and in the first phase of the grievance procedure, the plaintiff LAW was forever barred from his sole source of livelihood of nine and one-half years by the star chamber procedures. Respondents contend he is wholly without remedy as to either and he has no recourse to the courts, as they claim he had bona fide representation by the statutory exclusive bargaining agent, though the grievance-arbitration procedure is not made exclusive.

V. NOTICE, AN OPPORTUNITY TO APPEAR AND DEFEND IS A NECESSARY ELEMENT OF ANY GRIEVANCE-ARBITRATION PROCEDURE.

Respondent's Brief contends there is no requirement that LAW,

the subject of an accusation by his former employer, defendant Matson Terminal, would have any notice of any hearing, nor any opportunity to defend, but may be tried in absentia without evidence and convicted and forever barred from his livelihood of nine and one-half years as a ship clerk.

The last part of the decision of Humphry v. Moore, 375 U.S. 335, points out that the drivers, employees of Dealers, were represented by several stewarts as the joint committee meeting who were given an opportunity to and did explain their position; that these drivers had notice of the hearing, and were aware they were locked in a struggle for their jobs and seniority with E&L drivers; that there was no request for any continuance of the hearing until they could secure more representation; and they did not suggest they would have added anything to the hearing by way of facts or theory. The Supreme Court held there was adequate notice of the hearing, and adequate representation.

Here there was no claim of any notice of any hearing or knowledge of any charges or pending difficulty from the former employer Matson Terminals. The letter constituting the charges was sent early in December 1964 by PMA, not to the exclusive statutory bargaining agent, the defendant ILWU, but to Local 34 who did nothing until January 1965 when the photocopy of the letter was sent to the wrong address and was returned undelivered. Although some days remained until the meeting of the defendant Joint Port Committee, Local 34 did nothing. On the morning of January 13, 1965, LAW was not dispatched by the hiring hall but told to go to Local 34 headquarters in San Francisco. He did. Whether or not he received a copy of the PMA December 3rd letter on that date is wholly immaterial. He talked to the Union Local 34 committee but a few minutes. The meeting of the defendant

Joint Port Committee was either that morning or afternoon, and the evidence is conflicting. It would make no difference. The committee to act must have the joint concurrence and vote of both the employers and employee members, each side with one vote. LAW was assured by the Local 34 committee members they would protect him, and fight his battle for him, so no possible harm could come in any event, even if we assume he were told his matter was coming before the defendant Joint Port Committee sometime.

Certainly, notice either just before or a few hours before a meeting of charges serious enough to forever prevent LAW from ever again being dispatched and thus work at his sole means of making a living, is hardly notice required by fair play or due process. It should be noted that in the various correspondence for some months after the date of January 13, 1965, shows LAW did not even have knowledge of the charge as it appeared in the record, and his counsel's attempt to activate the grievance-arbitration machinery stated he had neither notice of any hearing nor knowledge of the charge, and even the reply correspondence shows there was no contention he had no notice nor charges and it was not until the interrogatories to the defendant Unions that any contention was made he received any copy of any charges or the letter of December 3rd, obviously an after thought.

In the very first stage of the grievance-arbitration procedure, the defendant Joint Port Committee meeting of January 13th, not the grievor, but the poor working man against whom a charge serious enough to forever bar him from his sole means of earning a living, was not even present, nor permitted to be present; but he was tried in absentia on the mistaken statement of Herman, president of Local 34, that LAW admitted his guilt. The defendant Joint Port Committee did not act by a vote, as the contract requires, but solely by the action of the employers and the employee members testified

they did not vote.

Any grievance-arbitration procedure that permits a trial in absentia without evidence, and bars a man from making a living at his sole occupation of many years from any of some hundred employers of ship clerks in this port, is clearly bad.

This is particularly true where different procedures are applied and different punishments depending upon whether a man is a book member of defendant Local 34, or not.

This is particularly true where the testimony of both the Local 34 business agent Campion and the PMA employee Kucin both testify that the provisions of discipline, Section 17.81 of the written contract signed and published in August 1965 was being and had been applied for a number of years prior to LAW's matter, and this provision permits discipline of ship clerks only for deliberate bad conduct in connection with his work as a ship clerk or illegal stoppage of work and deliberate misconduct is further defined in the new contract as pilferage, drunkenness and the like, carrying lesser punishment than forever barring a man from any employment by any employer.

In World War II, plaintiff's counsel served as a military government officer in Germany and had to interrogate Russians charged before the Military Government Courts, particularly about the understanding of their rights including right to a lawyer and in every incident the interpreter and the accused always got into an argument about the word "lawyer" or "counsel". Interrogation of the various Russian interpreters always brought out that the accused did not know the meaning of the words. Interrogation of the accused through the interpreter would bring out that if a person were accused with any offense, the police merely investigated, and then he was taken away to prison or was shot. If Russia had criminal courts prior to 1945, the

numerous Russians whom this counsel interrogated had never even heard of them, least of all any word describing somebody who represented an accused in a criminal proceedings. It may well be that the grievance-arbitration proceedings for ship clerks in the Port of San Francisco is copied on the Russian style of justice where a Union who refuses to admit such a clerk to membership may call the clerk in for a few minutes of interrogation, and he is then tried in absentia by his interrogators and accuser without evidence or even notice of any hearing or opportunity to present his side and convicted and forever barred from following his sole means of making a living of many years standing, as punishment; and the conviction is final.

Notice, an opportunity to be heard, and to present a defense is the bare minimum of due process and fair play in any grievance-arbitration procedure before an accused working man is forever barred from working for any other employer as a ships clerk.

It is impossible to conceive of any grievance-arbitration procedure where a former employer can lodge a charge against a working man that will forever bar him from following his livelihood with any of some hundred other employers of ship clerks in the Port of San Francisco, without permitting the working man at some time in the proceedings notice of the accusation, an opportunity to be heard, to appear and defend himself before he is convicted and barred from all future employment by any employer. This is contrary to our basic idea of fair play.

For the exclusive collective bargaining agent ILWU to abrogate its responsibility to the plaintiff in such a matter, and delegate not only the selection of the investigating committee to Local 34 and employee representation on the defendant Joint Port Committee to be chosen not by ILWU, the Union mentioned in the contract, but solely by Local 34 and confine

selection of these employee members of the Port Committee to vote of solely Local 34 members who are but part of the working force of ships clerks is clearly wrong. Certainly the duty of the exclusive collective bargaining agent is not to entirely shirk it, and throw the accused worker to the indifferent representation of Local 34 who refuses to admit him. It is a duty to represent him, fairly and in good faith.

The evidence is without conflict that in a matter resulting in LAW's permanent loss of his means of earning a living of years of standing, Herman, president of Local 34, Campion, business agent, and Robb spent but a few minutes with LAW. Their evidence in the case shows they did not understand his matter, each seeing it differently. They assured him they would defend and protect him. They did neither. Is this bona fide representation by the statutory exclusive collective bargaining agent, defendant ILWU? A stronger case of bad faith, fraud, and abuse of the statutory exclusive bargaining agent's authority and duty to represent LAW could not be imagined, and no trial court's finding it is fair and adequate is supported by the evidence.

VI. A COLLECTIVE BARGAINING AGREEMENT'S RIGHTS AND PRIVILEGES DO NOT DEPEND ON UNION MEMBERSHIP.

The evidence in the case at bar shows that sections of the collective bargaining agreement differentiates between registered, that is book men in Local 34, and nonregistered social security men not holding Local 34 membership. As such it is clearly void and illegal and contrary to the very concepts of labor law as developed in the Federal Courts and by Federal Statute.

There are two procedures in case of an employer's charge by grievance against a working man depending on whether there is Union membership or not. The evidence in the transcript clearly shows it, and the

trial judge so remarked on a number of occasions.

There are two standards of punishment on an employer's grievance against a working man. One for the Union member, and a far harsher one for the non-union worker.

The union member is dispatched for the duration of the loading and unloading of a ship while the non-union worker is dispatched for only a single day.

Earnings are different. The union member gets the health and welfare benefits, the benefits of the Mechanization Fund, (the multimillion dollar fund) and vacation pay. The non-union man does not. Yet each employer pays the same for each ship clerk regardless of union membership or nonmembership in the union. The difference is the fringe benefits, including vacation pay goes solely to the union members.

There is preference of employment and dispatch, for the union member has the preferred status of "registration" while the non-union ship clerk does not.

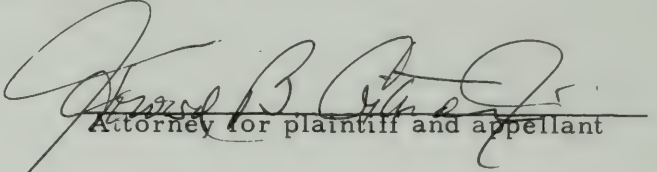
Any such attempt to differentiate between those working under a collective bargaining agreement on the basis of union membership is per se illegal and void and has been so held by this court in litigation involving both the defendant ILWU and PMA in NLRB v. Waterfront Employers, 9 Cir. '54, 211 Fed.2d 946.

This case at bar is a strong case, demanding justice and application of established law. In so far as LAW was treated differently depending on his lack of union membership, he has made a clear case for judicial protection and intervention to recover his livelihood, and the punishment must be annulled.

CONCLUSIONS

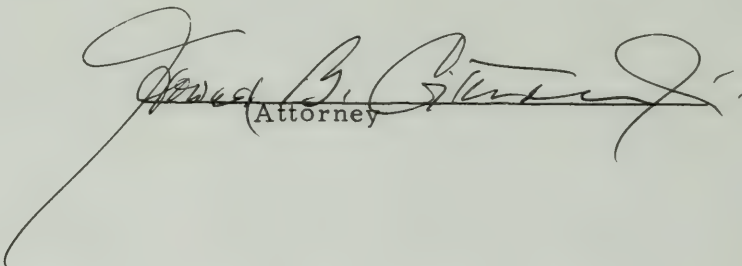
The judgment for defendant must be reversed and the cause remanded for judgment of both specific relief vacating the defendant Joint Port punishment and for compensatory damages, for loss of services, etc.

September 3, 1968.


Attorney for plaintiff and appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19, and 39 and 40 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

5 Sept '68


Attorney

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 19 1968

RUSEELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE,
SAN FRANCISCO, an unincorporated association,
PACIFIC MARITIME ASSOCIATION, an unincorporated
association, ILWU, an unincorporated labor union,
ILWU, LOCAL 34, an unincorporated labor union,
MATSON TERMINALS INC., a California corporation,
et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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FILED

JUN 17 1968

WM. B. LUCK, CLERK

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JOINT CHECKER LABOR RELATIONS COMMITTEE,
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ILWU, LOCAL 34, and unincorporated labor union,
MATSON TERMINALS INC., a California corporation,
et al.,

Appellees

On Appeal from the United States District Court
for the Northern District of California
Southern Division

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment denying the plaintiff relief from action barring him from his livelihood. Appellate jurisdiction of this court is based on 28 USCA 1291. Federal court jurisdiction is based on Section 301 of the National Labor Relations Act, 29 USCA 185 (breach of a collective bargaining agreement), 29 USCA 311 (Federal question) and 29 USCA 1337 (commerce). The collective bargaining agreement hereunder involved construction and validity of provisions under 29 USCA 401, et seq. 412 and 414 (Labor and Management Disclosure Act) and 29 USCA 151, et seq. (National Labor Relations Act).

The complaint was filed in the Northern District of California, Southern Division on June 7, 1965. The defendant ILWU is an unincorporated association and labor union with its principal place of business in San Francisco, and the statutory exclusive collective bargaining agent under 29 USCA 151, et seq. for all ship clerks employed in the Port of San Francisco under the collective bargaining agreement and a party to said agreement. The defendant PACIFIC MARITIME ASSOCIATION is an unincorporated association of employers of ship clerks including those employed in the Port of San Francisco and its principal place of business is San Francisco. The defendant MATSON TERMINALS, INC. is a corporation conducting business in the Port of San Francisco and hires ship clerks.

The collective bargaining agreement covering the hours, compensation, working conditions and terms of employment of ship clerks on the Pacific Coast including the Port of San Francisco is wholly in writing and is executed by the defendant ILWU as exclusive bargaining representative of the ship clerks and by the defendant PMA on behalf of the employers and consists of a number of writings, the principal one of which is the master agreement of clerks and checkers, etc. dated April 24, 1952, together with all written addendums and supplements set forth on page 3 of the complaint. This written agreement provides that it may be changed, amended, modified or altered only by a written agreement. The ship clerks in the Port of San Francisco are engaged in the flow of interstate and foreign commerce through said port and are a part of the maritime industry.

The defendant JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, is an unincorporated association that conducts the

hiring halls in the Port of San Francisco and dispatches the various clerks from time to time under the collective bargaining agreement to the various employment from time to time. This defendant Committee consists of representatives of the PMA and of the defendant Local ILWU, Local 34, an unincorporated labor union having its place of business in San Francisco and purports to have delegated to it by the defendant ILWU the administration of the collective bargaining agreement for ship clerks in the Port of San Francisco.

The plaintiff RUSSELL O. LAW has been since August 1955 and was until barred from his employment, the subject of this litigation, employed full time as a ship clerk in the Port of San Francisco and dispatched from time to time from the hiring hall in said port as often as he could obtain dispatches. He was during said time a full time member of the working force of ship clerks dispatched under the collective bargaining agreement by the defendant Committee who conducted the hiring hall.

The plaintiff Law was duly dispatched by the defendant Committee from its hiring hall on November 23, 1964, to work as a ship clerk checking cargo as an employee of the defendant Matson Terminal, Inc. He was paid for only 7-1/2 hours and not for the 8 hours he worked, and he took this up through the dispatcher, in the ordinary course of such proceedings. The defendant Matson Terminals initiated a complaint against the plaintiff Law in December by filing a form with PMA, plaintiff's Exhibit "15" (Tr. 208) and the defendant PMA through its employee Kucin wrote a letter of December 3, 1964, to the defendant union, Local 34 (Tr. 209-10), defendant's Exhibit "A". It was not until January 13, 1965, that the dispatcher at the hiring hall directed the



plaintiff Law to go to the union offices at Pier 1-1/2 where he was there told that some kind of charges had been made against him by the defendant Matson Terminals in connection with the S. S. M. M. Dant employment of November 23, 1964. The plaintiff discussed this matter with the officials of the defendant Local 34 at the said meeting and he was advised by the union officials that there was no fault of his; that Law had merely discovered a mistake occurring in the loading which had been immediately corrected and he was assured by the union officials that no blame would attach to him arising out of this incident.

Mr. Law was dispatched from the hiring hall and worked as a ship clerk on January 19th, on January 20th (when he worked for Matson Terminal) and again on January 21st when he worked for Matson Terminal a second time, (Plaintiff's Exhibit "6", Tr. 17), and then he was told by the dispatcher at the hiring hall that he would no longer be dispatched because of action taken by the defendant Joint Checker Labor Relations Committee. (Tr. 16).

Immediately upon learning that he was forever barred from his employment of over 9-1/2 years as a ship clerk, the plaintiff Law on February 1, 1965, sent a written request, Exhibit "A" to the complaint, to the defendant Joint Checkers Labor Relations Committee, to the Area Arbitrator Thomas, to the Joint Coast Labor Relations Committee, and to the Area Labor Relations Committee, San Francisco. This writing states that he had worked for 9-1/2 years and was involved in the state court litigation set forth in that action seeking to determine his rights as a ship clerk and for damages, etc. that he was advised a grievance was filed by Matson Terminals on a matter claimed to have arisen on November 23, 1964, in connection with his employment as a hatch

clerk on the S. S. M. M. Dant and that he had had no notice of any hearing or formal or other written statement of the grievance given to him or his counsel and that he had never had an opportunity to appear and defend this grievance or charge. He set forth that on January 13th he was told at 9:30 in the morning to go to the union Local 34 office of which he was not a member and he there met with a committee and he was orally told that some complaint had been filed against him in connection with the S. S. Dant matter which was fully discussed and it was determined that he was not at fault as he had only discovered a mistake which had occurred in the loading and which was immediately corrected, and he was advised that no blame would attach and the union official Campion stated that the union would stand behind him in this matter and he had a good record in over 9-1/2 years as a ship clerk. The written communication states that if it appears there has been any final action by the Joint Checkers Labor Relations Committee, he requested a hearing, or if the collective bargaining agreement provided for an appeal from the Port Committee then he requested a hearing by the Coast Committee or the Area Committee and request was made for an appeal to the Area Arbitrator Thomas. Law stated in this writing that the first knowledge he had that he was no longer to be dispatched was when he was told on January 22nd and that his request for hearing was set as soon as circumstances permitted. The writing states that he has only been paid for 7-1/2 hours when he actually worked 8 hours on November 23, 1964, and this error had been reported through channels and he asked that this be included in the hearing.

Attached to the complaint as Exhibit "B" is a letter of the Area Arbitrator to the counsel for Mr. Law stating that he was forwarding this communication of February 1, 1965, to the Joint Labor Relations

Committee. Instead of referring to the Master Agreement, Mr. Thomas refers to another agreement, (the Longshore and not the clerk agreement) wherein he sets forth that Section 17 of that other agreement refers to and spells out the steps to be followed in disputes and that 17.62 reserves to the Coast Committee and the Coast Arbitrator matters pertaining to the dispatch hall, interpretation of working and dispatching rules or discharges, and that in the event the Coast Committee disagrees he issue then goes to the Coast Arbitrator. Reference is made to that letter for further particulars.

Exhibit "C" to the complaint is a letter by Law's counsel to Thomas, the Area Arbitrator, dated February 17th acknowledging receipt of the letter of February 8th. It states that so far as counsel knew the grievance did not pertain to registration nor to dispatch hall nor to interpretation or dispatch rules nor to discharge and states that neither Law nor his counsel have seen any complaint filed by the employer purporting to charge Law with doing something wrong as acting in defiance of an order of his superior. That he actually corrected a mistake in the loading of the ship which he discovered and that this is proper conduct of a ship clerk and no grounds for a grievance nor for punishment. It states that Law had at no time been given charges nor other than a third or fourth hearsay knowing what these charges were and that Law has never had an opportunity of hearing nor to appear before the Port Committee, or to present facts and he learned that he was tried without notice and without hearing and without evidence and that he was punished for something he did not do and that promptly upon learning this he sent his notice of February 1st. This letter, Exhibit "C" to the complaint, sets forth that Section 21 of the Master Agreement of 1952 or if he is a longshoreman

then Section 17.25 of the Longshore Agreement of 1961, provides that only where the employee and employer fails to agree that there is a recourse to the Area Arbitrator. Thus where the Port Committee without providing charges proceeds to try him in absentia without notice, without an opportunity to be heard, without an opportunity to present his defense and presumably on non-existent testimony and then convicts him and imposes punishment, there is presumably unanimous action of the Committee and no further remedy would exist under the grievance-arbitration provisions of the collective bargaining contract. Counsel also pointed out that the sections quoted were in the Longshore Agreement and not the Clerk Agreement and that there is a separate contract for each. It states that it would appear from the Area Arbitrator's letter of February 8th that any effort to have a hearing before the Area Arbitrator is impossible and fruitless and that counsel had only received a letter from the Coast Committee dated the 12th stating the only remedy is for discrimination under Section 13.1 of the supplement of January 31, 1963, and that so far as counsel knew there was no suggestion of discrimination unless there are facts which have been concealed from Law and Law's counsel and counsel wanted to be sure that he had fully exhausted the arbitration-grievance procedure of the contract before resorting to the courts for his client.

Exhibit "D" to the complaint is a letter of February 12th by the defendant Joint Port Labor Relations Committee acknowledging receipt of the February 1, 1965, writing, (Exhibit "A" to the complaint). It states that ILWU is exclusive bargaining agent under the contract and no other person or organization could be recognized under this contract, including the grievance procedure, but that he was entitled to the

guarantees under Section 9 of the NLRA. It states that if he believed that Section 13.1 of the contract had been violated that procedure related to such an alleged violation (discrimination) was set forth in Section 17.4 through 17.31 of the contract (referring to the Longshore Agreement and not the Clerk contract) and enclosing a copy of the January 31, 1963 supplement to the contract for alleged discrimination because of non-union membership.

Exhibit "E" to the complaint is a letter of Law's counsel dated February 18, 1965, to the defendant Joint Port Committee acknowledging receipt of the letter of February 12th. It states that Law was the subject of a complaint arising during his employment by the Matson Terminals as a ship clerk on November 23, 1964, in connection with the S. S. Dant, that he had never received any statement of the complaint nor was he ever given any notice of any hearing nor was he ever permitted to appear before the committee and present his defense but in his absence he was convicted and barred from all employment as punishment. It states that there was no claim of any discrimination as none has ever been suggested. It states that on February 1st counsel sent Law's request for a hearing on the grievance filed by Matson Terminal before the defendant Port Committee in which the action was taken without charges, without notice and without an opportunity to be heard or an opportunity to present a defense and he then asked for the next step in the grievance procedure. Counsel stated he wanted to be sure and exhaust all possible steps in the arbitration-grievance procedure in the collective bargaining agreement before seeking Law's remedy in the courts and that counsel took it from the letter of the 12th that they would not permit Law any further steps in this arbitration-grievance procedure upon the complaint of Matson

Terminal in connection with this incident involving the Dant. This letter also states that unless there are facts that have been concealed from Law and his counsel he does not believe there was any violation of Section 13.1 of the supplement of January 31, 1963. It states that even the Committee of the union who met with Law determined he was not at fault and that the union official Campion had advised him that the union would stand behind him in that matter. That is certainly not discrimination within Section 13.1 of the supplement. This Exhibit "E" to the complaint states that Law's counsel did not think there was any question that in the grievance made by Matson Terminal, the most basic element of fair play is that an employee was entitled to charges, notice, an opportunity to appear and to defend himself before the Committee and to choose who shall and how he shall defend himself and who shall represent himself in such matter and that he should be entitled to exhaust the procedure of arbitration and grievance. Unless counsel heard to the contrary, he would assume the punishment of the Committee in this matter will receive no further hearing nor consideration in any further step in the arbitration procedure under the contract and the sole recourse was to the courts. Copies of this were sent to counsel for PMA, counsel for the union, and the Coast Labor Relations Committee and to the Area Arbitrator Thomas.

These steps in an attempt to use the arbitration-grievance procedure are set forth in full in the complaint and it is therefore alleged that the plaintiff has exhausted all possible remedies under the arbitration-grievance procedure and Law has lost the employment and dispatch and claimed damages of \$ 25,000 and in the complaint and for specific relief setting aside this adjudication of guilt in absentia without

notice and without an opportunity to defend himself.

A second count is set forth incorporating the material allegations except the damage clause and then pleads a cause of action for declaratory relief. The plaintiff sets forth that under Section 21 of the Master Agreement he is entitled to a fair hearing and an opportunity to appear and defend himself upon the charges of the defendant Matson Terminal through PMA acting on Matson Terminal's behalf. On the contrary the defendants contend there is no requirement, express or implied, that any employee and particularly the plaintiff have any notice or knowledge of any charge or grievance against him and that he may be tried in absentia and if he is represented at all it is solely by the defendant union who may and do tell plaintiff that he will not be subjected to a grievance or any punishment but who nevertheless in derogation of the statutory collective bargaining agent's duty delegate this duty to the defendant Local 34 who purports to confess the plaintiff guilty of the charges and have him forever barred from employment. The plaintiff contends that the entire collective bargaining agreement is in writing and cannot be changed by secret oral understandings and on the contrary the defendants and each of them contend that the written contracts disclosed under the provisions of Federal law to employees is not binding, but that the secret oral or other understandings between the defendants can and do change the collective bargaining agreement from time to time as circumstances shall please these defendants. The plaintiff also contends he is entitled to the provisions of all the disclosed terms of the collective bargaining agreement, including the arbitration-grievance machinery thereunder, and to have notices of the charges against him and an opportunity to defend and to appear upon these charges by Matson Terminal before the

defendant Committee and that the trial in absentia is void and a nullity. On the other hand the defendants contend the hearing is valid. The complaint appears in the record at pages 1 through 17.

Upon a motion to dismiss the defendant PMA filed the affidavit of Kucin an employee of PMA that attaches the copy of Section 21 of the Master Agreement of Clerks, etc. of 1952 and on page 28 of the record sets forth the minutes of the defendant Port Committee of April 13, 1965, that the complaint of Matson Terminals against Law for failure to carry out instructions and negligence in checking as a hatch clerk on the Dant on November 23, 1964, states that Law was instructed by the supercargo to load 7 conexes destined for Subic Bay in spot 33 right, that 6 were for Yokosuka and not to be loaded but held for another vessel. Subsequently it was discovered that the 6 for Yokosuka along with the 7 destined for Subic Bay were loaded and that it took 1-1/2 hours lost time to correct the error and the employers requested that Law be denied further dispatch. The minutes state:

"Union stated that Law admitted the complaint was factual.
He is not being dispatched. Case closed."

The affidavit of Kucin admits the communication of February 1st signed by the plaintiff and his counsel; admits the communication of February 12th and it sets forth a letter of March 16, 1965, to the plaintiff and a letter of the same date was also sent by the Joint Coast Committee to plaintiff. The letter of March 16, 1965, states that on January 13th the Committee heard the complaint of Matson Terminal concerning the Dant matter and requested that he not be dispatched. It states that the union stated that he had admitted to the Committee that the employer's complaint was factual and that the Committee determined Law should no

longer be dispatched and thereupon the Committee considered the case closed. It states that ILWU is the collective bargaining agent under the contract between ILWU and PMA and that he is entitled to the rights guaranteed under Section 9 of the NLRA. (R. 40). The Coast Committee's letter of March 16th (R. 41) to Mr. Law states the various correspondence had been forwarded to that Committee and it has discretionary authority to consider any matter concerning the operation of the joint dispatching hall or discharges and it states that the Coast Committee has decided not to take jurisdiction concerning Law's matter.

An affidavit was filed by plaintiff's counsel setting forth portions of the St. Sure deposition which was subsequently in evidence in this case. (R. 61-73) It points out the contention of the defendant that the collective bargaining agreement is changed by secret oral understandings not yet reduced to writing and the Port and Coast Committees that exist under the collective bargaining agreement by their practices change the agreement and that arbitration awards are not final but are the subject of subsequent agreements between the defendants. It further appears that the defendant union contends that the Coast Committee has no authority to amend the contracts as contended for by the employers.

The answer of PMA (R. 88-99) alleges that this is an unfair labor practice and therefore within the exclusive jurisdiction of the NLRB. It contends that the defendant Committee is not a legal entity subject to suit although it conducts the dispatching hall. It admits that Law was dispatched as a casual ship clerk until January 13th but alleges that he was not registered. It sets up in Par. XI that the collective bargaining agreement requires all grievances and disputes to be processed under the grievance-arbitration procedure and that the defendant Committee has a duty to

investigate and adjudicate all grievances and only if the employer and union members fail to agree may it go to the next step in the procedure and that a unanimous decision of any of these various steps is final and conclusive and only where it is claimed that there is a violation of Section 13, discrimination, is there any further remedy. It sets forth (R. 93) that the Committee duly "investigated" the grievance of the defendant Matson regarding the plaintiff and because the Committee in this grievance determined him guilty, denied him further dispatch as a ship clerk and it sets forth that Law was given notice of this action denying him his right to make a living. It admits the receipt of the communication of February 1st, Ex. A to the complaint, and it admits the defendant Committee's letter of February 12th, Ex. E to the complaint. It admits that on the basis of the apparent facts therewith no violation of discrimination under Section 13 and the exhaustion of the remedies. The answer of the employers on page 95 admits the contentions of the plaintiff and sets forth that the defendant ILWU is the exclusive representative for collective bargaining purposes of all ship clerks and it contends that the plaintiff received due and proper notice of the charge by the employers giving notice to the defendant ILWU and it contends that the defendant Local 34 fully performed its statutory duty in the absence of the plaintiff and it contends that the hearing in the absence of the plaintiff is valid. It sets up as an affirmative defense that the grievance-arbitration procedure under the contract is binding and that in absence of good faith or discrimination the decision of the defendant Committee is final and binding. It claims there is no cause of action stated. The answer of the defendant ILWU and of defendant Local 34 and of the labor representatives of the Defendant Committee (R. 107-116) is substantially

the same as the issues raised by the defendant employers.

Request for admissions appear in the record, pages 117-122. The responses appear on pages 126-147. Then follows interrogatories and answers to interrogatories and motions connected therewith. Pages 199-204 are a second set of request for admissions going to the address of the plaintiff shown on the W-2 form for the years 1962, 1963 and 1964 showing the plaintiff's last residence at 2231-57th Avenue, Oakland, as it appears this is the record of the defendants and the checks paid to the ship clerks showing Law's address at the same address. The employers admit the W-2 form showing this address.

It should be noticed that the union defendant Local 34 in January before the 13th sent a misaddressed letter to Law which was returned for want of a proper address.

Plaintiff's pretrial statement is in the record at 253-259. The employers pretrial statement is in the record at 260-267. The union's pretrial statement is 268-271, and the pretrial order is page 330-340. It is interesting to note that the plaintiff contends he received no notice, that he met with a union Committee, not the defendant Port Committee on January 13th and received no copy of the charges, had no notice of any hearing of January 13th before the defendant Port Committee and that he had no opportunity to appear and defend himself and that he had been a member of the full time working force since August 1955 following this employment as the sole means of his livelihood (Cl. Tr. 321). Defendant contends that he was a nonregistered or social security man and that this was only a revocable privilege to work through the dispatch hall. That on December 3rd Matson lodged a complaint with the Joint Committee under the collective bargaining agreement and that the union Local 34

attempted to notify the plaintiff of the complaint and sent it to the address shown on the union's records and that the letter was never delivered but returned. The defendants contend that on January 13th the plaintiff appeared at the Local 34 office at the request of that union and he discussed matters with various officials of that union and that he was appraised that charges had been brought and that he did not need additional time. The defendants contend that the Port Committee met and considered the grievance and contend that the plaintiff admitted he made an error and in accordance with its regular procedure it gave no consideration for any excuse and therefore ceased to dispatch him and ceased to permit him to work at his livelihood. (Cl. Tr. 322). Plaintiff's contentions as to damages and declaratory relief appear in the pretrial order, page 323-4, and the plaintiff contends that he had merely discovered a mistake and that the union Local 34 Committee had advised him that he was not at fault and had only discovered a mistake in loading which was immediately corrected and that no blame would attach. Plaintiff contends that his address on 57th Avenue was shown not only by his withholding statements which he provided through the dispatch hall but also his address was shown on the payments by checks to the defendant union for his monthly hiring hall charges and that the union dispatcher had his telephone number at all times and on occasion called him at nights.

The defendants contentions appear on page 325 claiming that the 1952 agreement had been superseded in all regards by the Longshore Agreement of 1961-66. The defendants deny that there is any contract requirement that a copy of the charges should be served upon him and deny that the contract gives him a right to appear in person to defend himself with regard to any grievance. The defendants assert that all

requirements of the contract were satisfied by giving him actual notice on the 13th of January through his exclusive representative, that is ILWU. The defendants contend that their oral understandings and interpretations change the collective bargaining agreement. The defendants claim that the 1/2 hour shortage of pay is not an issue in the case and that taking it up as the customary way was not sufficient but it should be taken up through regular grievance procedure. The defendants deny that Law was advised by the union officials on January 13th that there was no fault on his part (Cl. Tr. 325).

The case was tried before Judge Carter on May 9, 10, and 11 of 1966. A memorandum of judgment was made on August 8, 1967, one year and three months later and appears in Cl. Tr. 345-347 finding that the plaintiff is entitled to no remedy and the defendants to their costs. The formal findings of fact and conclusion of law were filed October 31, 1967, (Cl. Tr. 349-56) and the judgment was filed November 2, 1967 (pg. 359) and the notice of appeal was filed November 13, 1967 (Tr. 362) from the adverse judgment.

STATEMENT OF ISSUES

1. May a man be denied the right to continue his livelihood of 9-1/2 years as a ship clerk by charges of an employer without an opportunity to receive the charges or to appear in the first step of the grievance procedure, before the defendant Port Committee or to present a defense?

- (a) On a grievance by an employer is notice given when the sole notice is that given to a Local 34 and not to the statutory collective bargaining agent, the defendant ILWU?
- (b) Is notice of a grievance to turn upon the contention made many months subsequent that the defendant was handed a

copy of the letter of PMA on January 13th of a hearing on January 13th when no such contention had been forthcoming during the first months thereafter?

- (c) May the defendant Local 34 lead the plaintiff employee to believe that they are representing him and that he is not at fault and that no blame will attach and then go into a hearing and confess him guilty and vote for his being forever barred from his employment of more than 9 years?
- (d) Is a trial in absentia in which no evidence is given or heard sufficient in compliance with fair play to forever bar a man from working at his livelihood?

2. May the exclusive statutory bargaining agent, the defendant ILWU, delegate its authority to another entity, the defendant Local 34?

3. Is the disclosed written collective bargaining agreement or the secret oral understandings between the defendant PMA and the ILWU and the practices in breach of that contract the collective bargaining agreement?

4. If a collective bargaining agreement required that it be only changed by writing, is this a sufficient demand requiring any subsequent changes or alterations of that contract to be in writing and disclosed to both the employers and the employees working under that agreement?

STATEMENT OF FACTS

This action involves the right of the plaintiff to follow his livelihood and make a living as a ship clerk, an occupation of 9-1/2 years as his sole means of support.

The plaintiff Law worked as a ship clerk from August 1955 until January 23, 1965, and had no other income (Tr. 2). He went to the hiring hall for ship clerks every working day at 7:30 a.m. and signed in for his

dispatch (Tr. 2), although some days he would be dispatched if it were real busy without having to sign in. Sometimes he was dispatched by telephone and the dispatcher kept his telephone number for that purpose (Tr. 3).

Before 8:00 a. m. on November 23, 1964, the plaintiff was dispatched as a ship clerk to Pier 5 at the Naval Base in Oakland to work as a hatch clerk on the Dant (Tr. 3-5). He worked 8 hours quitting at 5:00 p. m. (Tr. 5). His log showed that the whole gang including himself worked from 8:00 to 5:00 that day. His pay check was sent by the defendant PMA for the week's work and he was only paid for 7-1/2 hours for November 23rd (Tr. 5-7). The pay check stub is in evidence, Exhibit 5.

The plaintiff in accordance with the standing practice notified Cleary, the Oakland dispatcher, of the pay shortage and this dispatcher telephoned someone in San Francisco about it (Tr. 8-9). Exhibit 5 carries the red ink mark made by the dispatcher (Tr. 8-9). This is the regular procedure for pay shortage in the Oakland hiring hall.

On January 13th the plaintiff was not dispatched, but the dispatcher Cleary in the hiring hall told Law to go to Local 34 offices at Pier 1-1/2 (Tr. 10-11). The dispatcher is elected by the union members (Tr. 11).

Law went home and put on better clothes and went to the union offices at Pier 1-1/2 on the morning of January 13th. This was a union organization and not the Joint Checker Labor Relations Committee (Tr. 12). Law was called in before the union group at union headquarters for not more than five minutes (Tr. 13). He was told that a complaint had been filed against him by Matson Terminal. It was something about getting cargo in the wrong hold for the wrong ship (Tr. 13).

The union committee asked him how long he had been around and he answered 9-1/2 years. They stated that he had a good record and they

were going to stand behind him in this matter and stated that all people make mistakes, and that was why there are rubbers on pencils (Tr. 14). He was not given any document or writing. He did recognize three parties present as Herman, Campion and Robb (Tr. 14). Herman is the president of the local union. Campion is the business agent and Robb he did not know what his position was in the union (Tr. 15). He did not know the other union persons present although there were 8 or 9 present (Tr. 16). Although he worked the week following, including two days for the defendant Matson Terminal (Tr. 17), it was not until subsequently that he was called into Cleary's office, the dispatcher, and told that they would not give him any more work. He did not find out about any action of the defendant Joint Port Labor Relations Committee until told that by his attorney (Tr. 16). As soon as he could see his attorney after Cleary told him he wasn't going to be dispatched, either that day or the next day, he went to see his counsel and the letter of February 1st was signed and sent (Tr. 18-19).

Law having lost his livelihood (Tr. 25) tried to get employment in a trucking concern, a steel company, etc., but he was told he was too old for such jobs (Tr. 29). He did heavy labor working out of the teamsters hall, but he hurt himself by pulling muscles (Tr. 26). He did get some work at a used car dealer as a roustabout wiping automobiles, changing tires, servicing automobiles (Tr. 26-27). He did two weeks of work as a relief salesman at the automobile firm (Tr. 27). He has trouble with calcium in his shoulder and he has had to draw State unemployment insurance (Tr. 27-8).

The incident on November 23rd involved loading a ship at Pier 5 (Tr. 28). Alternating between household goods in large containers, conexes, and smaller cargo. He was working with a lift driver who moved

the cargo to the point where the hook loads the boat (Tr. 29). It was on the far end of the dock (Tr. 30) and the miscellaneous cargo with the small boxes called "plunder". Law's immediate supervisor on the job was a Mr. Harvey who gave him his log and started him out. Later in the day Harvey came to him and told him to take a conex out of section 33 and then go back and finish 6, first. He did not give any directions to load any particular item (Tr. 31). The longshoreman running the lift truck complained he had been going up and down the dock like a maniac and said he would take that stuff and that the hook was hanging (Tr. 31-2). The clerk's duty is to sign the tags of the cargo loaded. He proceeded to sign the tags (Tr. 33), and he noticed that some of these tags were marked Subic Bay or some other name he thought was a Japanese port. When he went to sign the tags he discovered there was an error in loading (Tr. 34) and he immediately went to Harvey and asked if the ports were the same. He was told that they were not and so this cargo was removed (Tr. 35).

The union, Local 34, received PMA's letter of December 3, 1964, that initiated the charges against Mr. Law on behalf of the defendant Matson Terminal. There is no contention that this complaint or charge or grievance was ever delivered to the defendant ILWU, the exclusive collective bargaining representative of the employees. More than one month passed and it was not until January 6, 1965, that the Ship Clerks Association (def. Local 34) sent him a letter addressed to 3945 Delmont, a place he had only lived a few months in 1962 (Tr. 36). He did not receive this letter of Local 34, dated January 6th, as it was mis-addressed and returned to the sender. There is no issue that no written communication was ever mailed to the plaintiff Law by anyone concerning this complaint of this employer Matson Terminal.

Mr. Law provided his address of 2231-57th Avenue, Oakland, to the Port Relations Committee that ran the hiring hall (Tr. 37). He did this for his W-2 forms for the years 1962, 1963 and 1964 (Tr. 37) and this is in evidence as plaintiff's Ex. 14.

Law during this period of time from 1962 through 1965 made payments of money to the ship clerks for the hiring hall charges mostly by checks each of which bore the address 2231-57th Avenue (Tr. 39).

Not only did he provide the dispatcher with his address on 57th Avenue but he also provided his home telephone number as that is necessary for dispatches by telephone (Tr. 39-40). Law was at the hiring hall every working day except Saturday, Sunday and holidays such as Christmas (Tr. 41). The first notice that there was any employer complaint against him in his 9-1/2 years of service was when Cleary, the dispatcher, told him on January 13, 1965, that he was to go to the union office at Pier 1-1/2 (Tr. 41-3).

On cross examination Law testified that he worked out of the teamsters hall after his refusal of further dispatch as a ship clerk during 1965 earning about \$600.00 (Tr. 45) and that he earned about \$200.00 from Jory Motors. During 1966 up to the time of trial he earned about \$750.00 (Tr. 46). He was capable of doing regular work as a ship clerk but not heavy physical work he had tried to do because of the calcium condition in his shoulder and the doctor advised him not to try it any more (Tr. 46).

James Herman, president of defendant Local 34, was called as an adverse witness and testified that he was present at the meeting of January 13th at the union hall (Tr. 87) and that he was also a member of the Joint Port Labor Relations Committee that consists of members

selected by PMA and that the other members of that committee were representatives of defendant Local 34. Local 34 administers the contract locally (Tr. 88) and on January 13th the union members of the Committee were the witness, Campion, Gil Martin, Robb, and Dorsey. The Committee acts by a composite vote of the ship clerks association union members on one side and the employer members on the other. The employer members were Abbey, Domingo, Shepard, Littlefair and Kucin. The Port Committee meeting was called on January 13th at 10:30 a.m. (Tr. 89). His local union received Exhibit 12-A, the letter of December 3rd charging Law. This was received on December 4th (Tr. 89). The office girl in the local union office made a xerox copy of that letter and Exhibit 12 dated January 6th is a letter sent to Law but not received by him. The month delay between December 4th and January 6th was because no meeting was scheduled for the Joint Port Labor Relations Committee until January 13th (Tr. 90). No actual charge of the complaint was sent to the union Committee (Tr. 90), only the letter of December 3rd which is in effect a citation (Tr. 91). On the letter is marked "Agreed Law not dispatched - 1-13-65" which was placed by some girl in the union office (Tr. 92). Under it is written "Okay NTG 1-21-65" which means that this was read to the regular union membership meeting of Local 34 on January 21st. (Tr. 92). The letter of January 6th to Mr. Law was returned to the union because it was not his proper address (Tr. 93). This letter came back to the union on January 8th and no attempt was made to contact Mr. Law until the 13th (Tr. 93). One of the girls in the union office notified Mr. Cleary to send Law over on the 13th (Tr. 94), when he appeared at the union headquarters at Pier 1-1/2. That was the union Committee.

Herman testified (Tr. 95) that Law was ten or fifteen minutes in the

presence of the Committee and that Mr. Herman handed him a xeroxed copy of Ex. 12-A and testified that he asked Law if Law wanted a delay in the hearing so he could familiarize himself with the facts and Law declined the offer of a delay. Herman was asked about the provisions under the new clerk's contract as to discipline administered by the union, Section 17.81 which reads:

"All clerks shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. Any employee who is guilty of deliberate bad conduct in connection with his work as a clerk or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration. Any employer may file with the Union a complaint against any member of the Union and the Union shall act thereon and notify the Joint Port Labor Relations Committee of its decision within fifteen (15) days from the date of receipt of the complaint. An employer shall not be required to appear nor need he participate in discipline by the Union of its members beyond the filing of complaints." (R. 96-97)

Herman testified this would only apply to members of Local 34. The court specifically asked Herman if he understood that there was a distinction, the union only taking disciplinary action against members of the union as such and Herman answered that there were just different types of registration and union membership and that Law not being an A registered man would not come under Section 17 of the current contract. Union counsel stated that this portion of the contract does not apply to Mr. Law who is not a union member (Tr. 99). Herman testified that when the union acted under that Section 17.81, it did by the Committee before whom Mr. Law appeared (Tr. 100). Herman contends that Law indicated that the charges of the employers were accurate, and told Law that there would be a meeting of the Port Committee at 1:30 that afternoon and the union committee would report to the employers precisely what he had told them that morning (Tr. 100).

Herman testified (Tr. 102) that the Port Committee may only act with the union's concurrence, but this does not foreclose the other party from going to the next step of the grievance procedure; that if the union votes in favor of the working man, it would have to go to arbitration at the request of the employers but if the union declines to vote it doesn't mean that there is a stalemate, but the employer may exercise his objection to move the matter to the next step of the grievance procedure. Herman could not answer how many employer complaints against clerks had gone to the next higher step nor could he state for the last year, 1965, but he knew that some had gone to arbitration (Tr. 103-4). Herman admitted that he would present Mr. Law's viewpoint to the Port Committee and said something about Law dropping papers being an extenuating circumstance (Tr. 104-5). There was no chairman of the Port Committee, Kucin acting for the employers and Herman acting for the union (Tr. 106). Herman testified (Tr. 107) that he was the one who stated Law admitted the complaint was factual. He testified no one said "he is not being dispatched" (Tr. 108). There was no necessity of a vote as both the employers and the union were in agreement that Law was barred from further dispatch (Tr. 109). Herman admitted that he had access to the PMA records including the W-2 records showing the plaintiff's address (Tr. 113). In addition, the union maintains records of addresses that are supplied through the dispatch hall (Tr. 114). Herman testified that those against whom charges are filed by employers do not appear before the Joint Committee (Tr. 118). The Local 34 represents them at the Port Committee meetings (Tr. 118). Herman testified that he had never seen the letter of February 12, 1964, before, and that Kucin although an employer's representative acts on behalf of the entire committee on such matters (Tr. 119).

Gilmartin testified that he was an employee member of the defendant Joint Port Labor Relations Committee (Tr. 134) and was also a member of the union committee that met at Pier 1-1/2 on January 13th (Tr. 135). He called Mr. Law into the inner office (Tr. 135) and it was the secretary Campion who read the charges (Tr. 136). He testified Herman gave him a copy and said, "Do you want a little time to read this matter over" and Law answered, "No" (Tr. 136). The witness was asked whether Law had told them his supervisor had told him to move a container first and implied that he should come back and move the others into the hold (Tr. 136-7) to which the witness answered not exactly to those words, he said he had some trouble and it was near quitting time and the papers blew away and there was some kind of a muddle there. This witness said that Law made no mention of going to his supervisor to correct the mistake that he had discovered. The witness could not remember what was said at the defendant Joint Port Committee between the employers' representatives and the union representatives (Tr. 140) but the minutes, Ex. 13, reflect the meeting. He did remember that about Law he was dissatisfied with it and he wanted a rule to go in there that he (Law) was finished as far as the waterfront was concerned (Tr. 141). He testified that the union did not vote that Law be punished by being barred from further dispatch (Tr. 142). He testified that none of the union members voted and only the employer members voted (Tr. 142). He testified that Herman was the spokesman for the union members.

Mr. Gilmartin when asked about the next man shown in the minutes, a Mr. Urdahl, that the union disagreed on the charges that he had been drinking alcohol at the Matson Terminal and the union stated that they would only consider a complaint in which their opinion dealt with a

contract violation. He testified that the man referred to was "a book member" and he is handled all together different. He is handled through the grievance committee and not through the Labor Relations Committee (Tr. 143, lines 22 to 25).

Mr. Gilmartin testified (Tr. 144) that "book members" are tried by the union grievance committee. Page 144, lines 6 to 8:

"Q. Mr. Urdahl is a book man because he has a registration number, isn't that it?

A. Yes.

Q. And with him the union refused to do anything, so there is no punishment administered?

A. I don't know what it says.

Q. You read it and tell me if there is any punishment in his case.

The Court: I think we are beginning to get astray on this colloquy."

Whereupon the court barred plaintiff from making any further inquiry as to this "book man" or his matter.

On the waterfront, a man who is a member of the defendant union ILWU and one of its locals is a registered man, and has the particular status which appears in this record. Indeed the Master Agreement of 1952 specifically spells out that a person can only be registered by the joint consent of both the employers and the union and of course unless a man has been admitted to full book status, he does not have the status of "registration".

Gilmartin testified on cross examination (Tr. 146) that he was a ship clerk for the past thirty years and elected a member of Local 34 as one of the five members of their labor relations committee (Tr. 147). He only attends the committee meetings but does not handle any of the communications and the union secretary does this for the union.

Mr. Campion was called as a witness and testified (Tr. 149) and he was a member of this Joint Port Labor Relations Committee and that he

was the union business agent (Tr. 150). There are five union members of the Committee elected by the union membership. The Committee normally meets once a month. He was the secretary for the union labor relations committee (Tr. 151) and he received Exhibit 12, the PMA complaint on behalf of the defendant Matson Terminal on December 4, 1964 (Tr. 151). There was over a month's delay before the union sent its letter of January 6th to Mr. Law, which letter was never delivered for want of a proper address (Tr. 152) and it is normal for the business agent or somebody that is a full time employee of the union to go out to the place of the employer and find out what the complaint is about (Tr. 152-3). He believed this was done by Herman (Tr. 153).

Campion testified that where there is a pay shortage of say 7-1/2 hours being paid instead of 8 hours, it may be taken up either directly with him as business agent or through the dispatcher (Tr. 153-4). Law's shortage was not reported to him (Tr. 154), and the dispatcher could take it up directly with the employer by telephone (Tr. 154-5).

Campion testified (Tr. 157) that at the union meeting of the committee on January 13th, Law came to the union offices and Campion told him of a complaint from PMA (Tr. 157). He testified that after he had read the complaint Herman gave Law a copy. Asked if Law had stated that the supervisor had told him to move certain cargo first and then come back and move the rest of the items, he said he could not remember specifically. He can remember Law saying that he was quite rushed in that some of his papers had been dropped and he found that the cargo had been sent to the wrong port and then he immediately contacted his supervisor to rectify this mistake (Tr. 158).

Campion (Tr. 159) when asked whether he had told Law at the union

Committee meeting that he understood mistakes could happen and that is why they have erasers on pencils, replied that he did not remember whether he said it, although he might have said it as we all know that mistakes do happen. He did admit that the union and the Committee had stated they would intercede on behalf of Law with the employers. Campion (Tr. 159) testified that when he went to the meeting with the employers he left Law with the idea that he, Campion, and the other members of the union Committee were going to represent him and protect him before the Committee that included the employers. Campion testified that the minutes, Ex. 13 at page 6 of the defendant Port Committee, truly reflected what took place (Tr. 159).

Plaintiff's counsel read to Mr. Campion a portion of the defendant Port Committee's minutes, Ex. 13, (Tr. 160), that the employers suggest that since he is not a registered clerk he be denied further dispatch at the dispatch hall. Campion testified that that was not a remark but the determination of the Committee. It should be interesting to note that a "book man", that is a member of Local 34 of the union, is a registered clerk and therefore this punishment of denying further employment was administered to Mr. Law for this reason and this is the particular language in the minutes that as he was not "registered". Campion testified that the union members did not caucus on Law's matter (Tr. 161) and Campion testified that he voted at neither of the two meetings (Tr. 161).

It is interesting to note at page 163 of the transcript that the trial judge states:

"As I understand it, there is a different procedure for men who have different union status as far as the union is concerned."

This obviously sums just what happened to Mr. Law in this particular

matter. He was not a member of the union, and the union was therefore not interested in him or presenting his matter.

Notwithstanding the testimony of Mr. Campion on direct examination that if the union did not agree to the punishment of Mr. Law, it would then be up to the employers if they wished to take it to the next step, and that the Committee must act unanimously, one vote by the employer and one vote by the employee. Yet on cross examination Mr. Campion testified that the union could have taken it to the next step of the grievance procedure which was arbitration (Tr. 165). This is notwithstanding the direct language of the Master Agreement of 1952 and not the subsequent new agreement made about the time of this trial, and some two years after the action was filed, that only where the employer and the union failed to agree, may the matter go to the next step at the instance of the party seeking a remedy. Without a concurrence of both employers and union members, there would not be action of this committee and thus mere failure to act by the union would have left Law without any punishment and with the employers required to take it to arbitration or the Coast Committee if they deemed such a step proper.

Mr. Campion also testified (Tr. 166) that a different rule was applied to non-union, called "social security men" in that they did not accept excuses from them and this practice goes back prior to 1954.

On page 171 when Mr. Campion was being pressed for what would happen if the employee members refused to vote punishment against an employee charged with a grievance by an employer, he stated that a social security man would not be dispatched, but a union member would be dispatched. At this, the court observed that he understood it you have a different status and difference in dispatch depending on this matter of

membership. Again on page 172 in the colloquy between court and plaintiff's counsel, the witness Campion testified that as to social security men, that is men who are not union members, they are not dispatched even if the employee members do not vote punishment. Campion testified that the general difference was that as to a registered man when a citation comes in before the employer, it goes before the union committee. If he is found guilty a certain punishment is assessed by the union against its own member. This is then reported to the employer and if he agrees with the punishment which the union has cited, then that is the end of the case. However, the employer has a right to disagree, and can take it to arbitration and ask for further punishment. Under the contract the union does not discipline nonmembers (Tr. 172-3).

Mr. Campion testified at page 175, that the Master Agreement of 1952, Ex. 1, was used as the basic contract for a good number of years. They are now using a clerk's agreement known as the 1961 to 1966. When asked when he first saw a copy of this second contract, he testified that it was only within the last few months (Tr. 176), but all of these matters were negotiated through the years of 1961 on. It appears on page 177 that there was a stipulation that the second agreement known as the 1961-66 agreement was signed in August 1965, Ex. 2 in evidence (Tr. 177).

Robb testified (Tr. 180) that he was a member of the committee that is one of the defendants to the suit and also a member of Local 34, ILWU Committee that met on January 13th (Tr. 181) and that there were five or six present at that committee meeting. When the union Committee gets a complaint somebody usually is sent out to investigate it (Tr. 182); but he does not know who investigated the Law matter. Mr. Robb testified (Tr. 183) that he had known Mr. Law and had worked with

him quite a bit in the Port of Oakland as the witness had been a ship clerk since 1950. Mr. Law was being dispatched from the Oakland hall (Tr. 184). At this meeting, Mr. Campion told Law that there was a charge or grievance filed against him involving the Dant. When asked whether Law had stated that Harvey had told him to move certain items and then come back and move others, the witness said that Law gave his impression of the charges but he couldn't quote anybody verbatim at this time (Tr. 185). He testified (Tr. 186):

"A. Well Mr. Law at the time stated exactly what he had had happen, and basically this is what he was trying to do was to follow the instructions of his supervisor and got confused somewhere along the line."

He testified that as a result some conexes or boxes got in the wrong hold and that when Law found this out he went to his supervisor and asked him if this was the right port. Mr. Robb testified (Tr. 187):

"A. I believe Mr. Herman said that we would present his facts to the employers and the extenuating circumstances and it would be good for him."

On page 190 the testimony was:

"Q. Now in this particular case there was a grievance filed by Matson Terminal, and that would of course, necessarily come before the Joint Committee wouldn't it?

A. In the case of a social security clerk, yes.

Q. Now if he weren't a social security clerk it would just end, then, with your union committee; isn't that it?

A. A grievance --

Mr. Leonard: Objected to on the grounds it is immaterial how matters involving other classes of employees are handled.

The Court: For purposes of making the distinction, I will have to overrule that objection. Just briefly, what he is trying to do is to make a distinction between a social security man on the one hand and a union man on the other as to how the complaints against them are handled.

The Witness: If a complaint is filed against a union member, it goes to our grievance committee. It is processed by the grievance committee. The findings are then passed on to the Labor Relations Committee who reports it to the Joint Labor Relations Committee.

"Mr. Crittenden: Now as to the man that is not a union member, that goes directly to the Joint Committee, is that correct?

- A. Well it comes directly to the union Labor Relations. We bring it to the Joint Labor Relations Committee and process it from there."

Robb testified (Tr. 191) that the union committee determined that they would go in and fight Mr. Law's battle for him with the employers. Among the union members of the Port Committee, their action is on a majority rule basis (Tr. 193). The Labor union members when Law was present decided, "They would go to bat for him", and promised they would help him on the employers' grievance. This was their promise (Tr. 194). Herman was the spokesman at the Port Committee meeting and that Law admitted the complaint was factual (Tr. 195). There was no vote taken at the Port Committee (Tr. 196).

Robb testified (Tr. 197) that he had known Law for a number of years and had worked with him at the Port of Oakland; he could not remember anything about Law's abilities or work and assumed that he was conscientious. He testified (Tr. 199):

"Q. Mr. Robb, aren't there instances before the Joint Labor Relations Committee where the employee members refuse to go along with punishment and the matter just stops right there, the employers insisting on punishment?

- A. The way this is set up, if we refuse to agree with the employers or the employers refuse to agree with us on our complaint, the spokesman that states he will take this to the next step of the grievance machinery. Now, this is the way it works at all times.

Q. Do you know of any case where there has been a disagreement and the matter has just dropped there without going to arbitration?

- A. These cases, sometimes the employer or union if there is disagreement reached and it is stated that it goes to the next step of grievance machinery, maybe a man is late or something like that. I doubt very much -- and maybe he disagreed or something like this. I don't think the employer would spend \$100 to slap the man on the wrist for this.

The Court: What do you mean, that they would not then proceed, withdraw their complaint or what?

The Witness: We have stated the case and disagreement is reached, and if the employers desire to take this on further, they will then call for arbitration.

The Court: You will call for arbitration?

The Witness: Well, the employer will call if they are filing the complaint against our member, but it depends entirely upon the case itself, such as smoking or a minor difficulty, and the employers won't press this. It costs both sides quite a bit of money to arbitrate."

Mr. Kucin testified (Tr. 206) that he was a member of the Joint Port Labor Relations Committee and had been a member since 1954. He was an employee of the defendant PMA. There are two dispatch or hiring halls (Tr. 212) and when an employer wants a ship clerk, he notifies the hall who dispatches a man to work under the collective bargaining agreement for that employer (Tr. 213). A registered man (that is one who is a union book member) is dispatched for as long as the job may last. If he is nonregistered (that is not a member of Local 34), he is dispatched for one day only. (Tr. 213). Permanent or monthly clerks are not dispatched but work for the company on a monthly basis (Tr. 214). No notice of the charges were sent Mr. Law by the defendant Joint Port Labor Relations Committee (Tr. 214). Neither was a notice of the hearing of January 13th sent to Mr. Law (Tr. 214). The PMA letter (Ex. 12-A) which was the complaint or charge of the employer Matson Terminal was addressed to Local 34, the ship clerk's association. The particular complaint against Law was numbered 21-64 (Tr. 217). At the meeting Mr. Kucin read the complaint since it is an employer complaint and asked the union for a reply (Tr. 217). Herman spoke for the union's side. The reply was that Law was guilty and there were some extenuating circumstances but he did not recall the details (Tr. 218). There was no vote taken because the union reported the man guilty (Tr. 218). Since he was a nonregistered man called a social security man (that is

one who is not a member of the union) it is normal procedure that his services be terminated (Tr. 219). No notice of the action was sent to Mr. Law (Tr. 219), but the witness believed he talked to the dispatcher sometime the following week (Tr. 219).

Mr. Kucin testified (Tr. 220) that whatever information such as the address of Mr. Law in the W-2 forms for the years 1962, 1963 and 1964 were available to the members of the Joint Port Labor Relations Committee, and to all of the other persons on that Committee (Tr. 220). They merely had to look at the PMA record section for that information (Tr. 220).

Mr. Kucin testified that Ex. 2, the new clerk's contract was distributed sometime in 1965 (Tr. 221). This contract was put into its present form and the agreed language sometime in 1965 (Tr. 222), and the distribution made to the employer members sometime in the summer of 1965, probably in August (Tr. 222). Kucin testified that when there is not agreement at the port level, the matter may be dropped by the side bringing the grievance, or it may go to arbitration at the request of the complainant (Tr. 229-31). If it went to arbitration, it would go to the Area Arbitrator and there were instances where the employer did not get an agreement and the matter was terminated. There were very few instances where the employers complaint resulted in dismissal of the employee (Tr. 231). There is a different rule applicable as to those who are registered and those who are not registered (Tr. 231). Kucin testified (Tr. 242) that a representative of Matson Terminal was sitting on the Committee side with him, and had any of the extenuating circumstances been acceptable he would have so advised, but he did not. They did not hear Law's side of the story, only the statement by the union that he

was guilty as charged (Tr. 243).

Exhibit 3 contains the 1963 deposition of Paul St. Sure showing the contention of the defendants as to the various written contracts and that there was in the process of negotiation another contract, which is evidently this agreement Ex. 2 signed in August of 1965.

ARGUMENT

The procedure requires that there be a minimum of fair play of at least knowledge of the charges, notice of the hearing and an opportunity to appear and defend.

At no time was the plaintiff Law given any notice of any hearing before the defendant Joint Port Labor Relations Committee. At no time was he given an opportunity to appear and present his side. The first knowledge he had that charges were made against him by an employer was on the morning of January 13th when the dispatcher told him to go to the union headquarters in San Francisco. That was the day he was tried in absentia by the statement of the union official Herman to the Joint Committee in his absence that the allegations were factual, that is he Law was guilty.

This was the first step in the grievance procedure.

The Master Agreement for Clerks, etc. (Ex. 1) provides in Section 21 for the grievance machinery. It provides that there shall be immediately established and maintained during the life of the agreement a Port Labor Relations Committee for each port affected by this agreement, and a Coast Labor Relations Committee at San Francisco, California, and each of such Labor Relations Committee are to be comprised of representatives by the union and representatives designated by the employer. The agreement provides that it shall act by one vote of the employers and

one vote of the union. Subparagraph 3 of Section 2 provides that grievances arising on the job shall be processed first between the dock steward and management and if it is not settled, then it shall be referred for determination to the union official and to such representative of the employer as the latter may designate and the subdivision (c) of subparagraph 3 provides that if the grievance is not settled in steps (a) or (b) above, it shall be referred to the Port Labor Relations Committee. Subparagraph 4 provides that the Port Labor Relations Committee shall adjudicate all disputes arising under the agreement including grievances under subparagraph 3. Only in the event the employer and the union members of any Port Labor Relations Committee fail to agree upon any question before it, can such matter be immediately referred at the request of either party to the Area Arbitrator for hearing and decision, and the decision of the Area Arbitrator is then subject to further provisions. Subparagraph 5 provides that should there be a failure on the part of either party to participate in any of the steps of the grievance machinery, the matter shall automatically move to the next higher level. In any case where the Area Arbitrator makes a determination, subparagraph 7 provides that either party may immediately have this referred to the Coast Labor Relations Committee and if the Coast Labor Relations Committee cannot agree, it shall be referred to the Coast Arbitrator who shall have power and duty to set aside the decision found in conflict with the agreement.

If we can believe the labor members all of whom were called as adverse witnesses, there was never a vote by them that any punishment be administered to Law, and therefore there has been a breach of this agreement.

In any event, the initial and first step in the grievance of the

Matson Terminals against Law was commenced by a form provided by PMA to be completed and which was completed and forwarded to PMA. PMA on behalf of its employer wrote the letter of December 3rd not to Law and not to the exclusive bargaining agent for the employees, the defendant ILWU, but to the defendant Local 34 who proceeded to sleep upon the letter for one month and several days when some secretary in that local union's office wrote a letter, Ex. 12 in evidence, and sent it to an address in which Law had lived but several months early in 1962, and not to his regular address on 57th Avenue in Oakland. This letter was returned in the course of several days undelivered to the defendant Local Union No. 34. Notwithstanding there were still several days before the next Port Committee meeting, this union waited until the morning of January 13th when they had their elected dispatcher at the Oakland dispatch hall, Cleary, tell Mr. Law to go to the union headquarters over some employer complaint. Law went to the union headquarters in San Francisco, Pier 1-1/2, and had a short meeting with the union Committee of some half dozen or more persons. Both Law and several members of this Committee were of the opinion that Law expected the union to, and the union promised to put up a contest for Mr. Law.

Instead, Mr. Herman, the president of Local 34, went into the meeting of the Joint Port Labor Relations Committee and proceeded to not only vote Mr. Law guilty and confess him guilty, but also to impose the punishment of barring him from making his livelihood by preventing further dispatch from the hiring hall.

We do not believe that the District Court is required on such a proceedings to go into the merits and retry the case of the employers' complaint against Mr. Law. It need only inquire as to whether the contract

was followed and performed and if the plaintiff Law was afforded a semblance of fair play and due process in the loss of his job and livelihood and if this conviction by this Committee barring Law from his permanent occupation should be annulled or set aside and damages granted for breach of the contract. Instead the court went ahead and attempted to make findings that Law was guilty of negligence and refusal to obey orders and to find that although no notice was ever given nor was any appearance ever had before the defendant Port Committee, by Mr. Law or that he was afforded an opportunity to present a defense before the defendant Port Committee, the court undertook to believe some of the union officials that Law had told them he was guilty as charged and find that this defendant local union acted in good faith in the performance of the duty of the exclusive bargaining agent (which it was not).

The facts are without dispute that the first knowledge Law had of any complaint, charge or grievance against him by any employer was on the morning of January 13, 1965, when he was notified by the Oakland dispatcher that he was to go to the union offices in San Francisco. He went to this union meeting that day and was there told that there was some kind of charges against him by Matson Terminal in connection with the S. S. Dant loading. His knowledge and belief is set forth in his communication of February 1, 1965, to the defendant Port Committee, to the Area Arbitrator, the Coast Labor Relations Committee and the Area Labor Relations Committee, attached as Exhibit "A" to the complaint. The correspondence that followed are set forth in the Exhibits "B", "C", and "D" to the complaint (all of which are admitted and not in issue). There were two further letters, one of March 16, 1965, by the defendant Port Committee, which appears on page 40 of the clerk's transcript and

another of the same date by the Coast Committee (Cl. Tr. 41) both of which are in evidence. At this stage of the proceedings, there was no contention that any copy of any PMA letter constituting a charge was ever delivered to Mr. Law. Indeed it was never contended that this was even given to or sent to the statutory collective bargaining agent, the defendant ILWU, but the only contention is that it was sent to another entity, Local 34. There is no contention that Law was ever given any knowledge or notice of this proceedings prior to the 13th day of January when the defendant Port Committee met and adjudicated him guilty in his absence. There is no contention that Mr. Law was told or informed that he could appear to defend himself or to present any matter in his defense. He was led to believe, and there is no issue on this, that the union, Local 34, intended to defend him and to protect him. Consequently, it would be impossible for the Port Committee without the concurrence of its union members to act adversely to Mr. Law.

The first essence of any proceedings such as a grievance, requires that the accused employee would at least have an opportunity to have the particular charges set forth with particularity, and to be given a notice as to when and where there will be a presentation of the matter, and an opportunity to hear the evidence against him, to rebut it, test it by examination, and to present his defense. Even the testimony of the defendant union members of this defendant Port Committee was that they were very vague as to just what the matter was and what Mr. Law's defense was or even what they called "extenuating circumstances" being something about some papers flying loose and he being harrassed. Construing of the testimony most favorable to the defendant, we do not even have the barest semblance of any hearing or of any representation

or of any defense. Instead we have testimony of these union employee representatives on the Port Committee that they assured Mr. Law that they would defend and protect him in a committee (if it reached there) where unanimity of both employer and employees was necessary for any consequences to flow from it detrimental to Law. Instead we find that he is pled guilty and forever barred from his livelihood of more than 9 years.

Mr. Law stands convicted and barred from his livelihood on charges tried in absentia, upon contentions that on January 13th he received a copy of a letter which he did not receive, but which is clearly shown to have been a returned letter upon a finding that he received a xeroxed copy on January 13th at the union committee when there was no contention at any time in the first months after January of 1965 that he had been given such a copy. Handing a man such a paper on the very day of the Port Committee meeting, is hardly a notice even if it were delivered. It is interesting to note that none of the defendants' answers nor their contentions in the pretrial order contend that any such notice or writing was handed him on January 13th and that this appeared only in the answers to interrogatories filed long after the early part of 1965.

There is no issue that the members of Local 34 who were part of this defendant Port Committee and also members of the defendant Local's Committee with whom Law met represented to him that they would fight his battle if it came before the Port Committee, who must have concurrence of the employee members in order to act. This would lead any person and it did lead Law to believe that in the initial stage of the grievance, that nothing adverse could occur. This is certainly a strong showing that he was not in this initial stage required to do anything.

This leads us to the next question. May this defendant Local 34

members of the defendant Joint Port Committee and members of that local union's committee who met with Mr. Law on January 13th lead him to believe that they would represent him and defend him from the employers' charge, and then go into the hearing on that same day and where joint action of both parties is necessary, confess him guilty when he was not, and vote for his being forever barred from his employment of more than 9 years? The obvious answer is that if this Local 34 were the collective bargaining representative, they had no authority or right to make the representations as shown in the record and then to confess him guilty and acquiesce his being barred from his employment of more than 9 years.

It was obviously a trial in absentia before the defendant Port Committee. It was certainly extrinsic fraud, if he were in fact told that there was to be a meeting that day to lead him to believe that the necessary employee half of the Committee was to protect him when it did not. This is clearly grounds in the concept of fair play to give rise to the defense of ~~Ex~~trinsic fraud which if he had known of the meeting of either 10:30 or 1:30 on January 13th (and the evidence is conflicting on the hour of this Port Committee) and the testimony is conflicting as to whether he was told there was to be a meeting that day of January 13th of the Port Committee or indeed if there were to be any meeting at all. This is no notice required as a minimum of fair play or due process or of any grievance procedure.

In any event the trial was in absentia and in which no evidence was given or heard and in which the union defendant Committee member Herman stated the accused was guilty (the charge is factual) while the other members sat by in silence and acquiesced in forever barring him from his sole employment of over 9 years and under the agreement

from any further steps in the grievance procedure in effect at the time of the alleged incident.

The contract in effect at the time of the November 1964 incident and at the time of the January 13th proceedings is Ex. 1, the Master Agreement etc., of 1952. In 1963 the deposition of Paul St. Sure was taken in the Alexander case, No. 40935, and is in evidence in this case as Ex. 3. Mr. St. Sure was then president of PMA and he testified on the first several pages of his deposition that the "Pacific Coast Longshore and Clerk's Agreement" was then in its first draft and in the course of preparation in an endeavor to codify the prior agreements, understandings, rulings and awards on both the longshoremen and clerks but that the language was not yet agreed upon except so far as the longshore portion was concerned that the writing covering clerks was the Master Agreement of 1952 but that only portions were in effect although the agreement provided that it could only be changed or modified by writing. On page 25 of that deposition, lines 14 through 27, he testified that the Coast Committee signed minutes were used to interpret, clarify, modify, or amend the basic written contract (that is a creature of and a committee created by and existing under the agreement could change the contract: the tail could wag the dog, so to speak). He also testified that when an idea or agreement had been orally reached, it was a part of the contract even though it was not reduced to writing, although they prefer to reduce it to writing.

Mr. St. Sure on his deposition testified at page 60, lines 24 to page 62, line 21, that the exhibit marked 39 attached to that deposition, a supplementary agreement dated February 28, 1962, in Section 9.11 of that exhibit referred to two agreements then in effect and being

changed by that writing, to wit, the Pacific Longshore Coast Agreement and the Pacific Coast Master Agreement for Clerks and Checkers (Ex. 1 in this case). Consequently, as of February 1962 there was then recognized in effect the Pacific Coast Master Agreement by written agreement between the negotiating parties but Mr. St. Sure pointed out that over the past ten years (prior to 1963) that there was historically two agreements on separate pieces of paper one of which covered clerks and that the mechanical job of getting them together in one volume had been in process over ten years.

Mr. St. Sure testified on his deposition, page 67, lines 6 to page 69, line 23 that the June 1962 written supplement purported to amend a portion of the Coast Longshore agreement and the appropriate section of the Clerk's Master Agreement. Mr. St. Sure explained again that they were separate pieces of paper but that they had not yet gotten into a single form as a matter of draftsmanship and that the agreement includes some twenty-three arbitration awards but that these are a matter of mere tabulation in the agreement and that these awards are not final but still something that are the subject of mutual agreement between the parties who modify it by that power.

On page 106, lines 11 to page 107, line 11 of the St. Sure deposition, Mr. St. Sure was asked about the Area Committee and he testified that as only to the longshoremen was there an Area Committee but that on the clerk's side there is only the local and the Coast committees.

In the deposition, page 161, line 1 to 162 line 7, Mr. St. Sure referred to Exhibit 21 in that deposition dated June 1962 which provided for insertion in the Clerk's Master Agreement of certain provisions. Again Mr. St. Sure pointed out that they were separate documents as

to the longshore and clerk contracts and that as of June 1962 there were two sets of documents, one of which was the Master Agreement for Clerks. This matter of the contention that this Clerk's Agreement was changed by custom, practice and these oral understandings not reduced to writing will be discussed later in this brief.

Ex. 2 is the new clerk's agreement purporting to cover the period 1961-66, however, the evidence and the stipulation shows that it was not signed until August 1965 nor was it in writing or circulated to either the employers or the employees until either late summer or fall of 1965, sometime after the matters involved in this proceedings.

Although this document of 1961-66 for the clerks, Ex. 2 in evidence, was not signed until August of 1965, it was the defendants' position that these sections of the 1961-66 agreement, Ex. 2, had been in effect for some period prior to the signing of the agreement, although they do not appear in any clerk's written agreement or supplement up to the time of the signing of Ex. 2 in August of 1965.

Ex. 2 (that was signed in August 1965, and not distributed prior thereto) provides on page 36, Sec. 17.11, that the parties shall establish and maintain Joint Port Labor Relations Committee for each port and a Joint Coast Labor Relations Committee and each of these committees shall be comprised of three or more representatives designated by the union and three or more representatives designated by the employers. Each side of the committee shall have equal vote. Sec. 17.12 provides that the Port Committee shall maintain and operate the dispatching halls, exercise control over registration, decide questions regarding dispatch and adjudicate all grievances and disputes under Sec. 17. On page 38, Sec. 17.26 provides that the Coast Committee has jurisdiction to

consider certain issues presented to it and Sec. 17.261 that any decision of the Joint Port Labor Relations Committee or arbitrator claimed to be in conflict with the agreement shall be subject to and immediately referred to the Joint Coast Labor Relations Committee and if they cannot agree to the Coast Arbitrator. It is interesting to note that mere conflict claimed with a contract entitled either party to a grievance to go to the next higher step, while the Master Agreement of 1952 only permits this from the Joint Port Committee, if the parties cannot agree.

Page 43 of Ex. 2, signed in August 1965 covers discipline and in Sec. 17.71, gives the employer the right to return to the hall any man who is incompetent, insubordinate or fails to perform his work as required and Sec. 17.73 provides that any man who feels unjustly aggrieved by being returned to the hall may have his grievance reviewed as provided by 17.2 et seq. and the following section 17.74 provides that in the case of return to the hall without sufficient cause, the Joint Port Labor Relations Committee may order payment for lost time or reinstatement without pay for lost time. In Sec. 17.81 (quoted on page 23 of this brief) strangely enough provides that all clerks shall perform their work conscientiously and with sobriety and "with due regard to their own interest" shall not disregard the interest of the employer. It goes on to spell out that a clerk must be guilty of deliberate bad conduct in connection with his work or through illegal stoppage may be fined, suspended or in repeated offenses his registration cancelled. The employer's sole remedy under this seems to be to file with the union a complaint and that the union then notifies the Joint Port Relations Committee of its decision within fifteen days and the employer need not appear.

Were this in effect, no clerk could be punished except for deliberate

misconduct as spelled out in the section, and that only upon repeated offenses could his livelihood be taken. Impliedly, he is subject to punishment for a lack of sobriety. Section 17.8 provides that there shall be penalties for work stoppage, assault, pilferage, drunkenness and other offenses. In view of the section immediately following it, it could only be deliberate bad conduct or work stoppages, intoxication and assault or pilferage that could be punished.

On page 44 of Ex. 2, there is Sec. 17.81 that if within thirty days after an employer is dissatisfied with the disciplinary action taken under Sec. 17.81, then the procedure under Sec. 17.82 may be followed which shall also be applicable in case of clerks not members of the union.

Sec. 17.82 provides that the Joint Port Labor Relations Committee has power and duty to impose penalties on clerks who are found guilty of stoppage of work, assault, refusal to work cargo in accordance with the provisions of the agreement, or who leave their job before relief is provided or who are found guilty of pilfering or broaching cargo or of drunkenness or who in any other manner violate the provisions of the agreement or any award or decision of an arbitrator. Obviously mere negligence is not grounds for discipline.

On page 44 of Ex. 2 at Sec. 17.821 there is provided assault in which the minimum penalty is one year suspension from work and for a second offense mandatory cancellation from the registration list and it provides that such conviction shall not be dependent upon the existence of a prior court decision nor shall determination of guilt await a court decision. Sec. 17.822 provides for pilferage and the first offense shall be a minimum of sixty days suspension from work and for a second offense mandatory cancellation of the registration list. Sec. 17.823 covers

drunkenness or smoking in prohibited areas in which the first offense requires the suspension of fifteen days and a second offense a suspension of thirty days and for succeeding offenses the minimum penalty is sixty days suspension.

Page 45 of Ex. 2, Sec. 17.84 provides that in the event of disagreement of the Port Labor Relations Committee as to the imposition of a penalty, the issues shall be processed immediately through the grievance procedure and to the Area Arbitrator if necessary. Sec. 17.85 states that these rules and penalties hereinabove provided are applicable to both registered clerks except that a more stringent rule or penalty is applicable to limited registered and nonregistered clerks (that is non-union men). In amplification of this at the top of page 46, Sec. 17.851 provides that more stringent rules and penalties than those provided hereinabove are applicable to limited registered clerks or to non-registered clerks or to both such groups as may be adopted or modified by the unanimous action of the Coast Committee and subject to the control of such committee when so exercised.

We need only observe that the rule as to union and non-union employees is different but also that even as to non-union men such as Law, if this provision of Ex. 2 were in effect, the attempted punishment and the procedure was not at all in accordance with the contract and consequently in breach thereof.

II. THE EXCLUSIVE STATUTORY BARGAINING AGENT, THE DEFENDANT ILWU, MAY NOT DELEGATE ITS AUTHORITY TO SOME OTHER ENTITY, THE DEFENDANT, LOCAL 34.

It is a basic rule of law that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not entrust the performance of his duties to another without the

consent of the principal.

2 C. J. 685, Agency Sec. 342.

Under the federal law, an exclusive statutory bargaining representative is granted broad powers and discretion to bind all of the workmen within the classification from which the agent is elected. Only the statutory collective bargaining agent has this authority to represent or to bind the various individual employees. Where it involves any matter of discretion or skill or judgment it cannot be delegated.

In the case at bar it is admitted and the testimony throughout that the exclusive bargaining agent for all of the ship clerks is the defendant ILWU. Except to lend its name and delegate its authority, this defendant took no part in the proceedings. It is not contended any notice was given to this defendant ILWU. It is not contended that this defendant ILWU did any act or thing in the particular proceedings except to lend its name and authority to the defendant Local 34.

The statutes and the decisions of both the courts and of the administrative agencies have very definitely prescribed the authority and limit of this statutory exclusive bargaining agent's authority and power together with the field in which it may exercise its judgment, its skill and discretion is obviously void and beyond its authority.

It has never been contended that in the initial stages and in the first phase of any grievance procedure where a grievance is brought by an employer that the exclusive collective bargaining agent may abrogate its duty or even delegate it to another nor may it as the evidence shows appoint some persons to perform its power, discretion, skill and judgment and who do so either negligently or wrongfully.

III. IT IS THE DISCLOSED WRITTEN COLLECTIVE BARGAINING AGREEMENT THAT IS INCORPORATED IN AND GOVERNS ALL EMPLOYER-EMPLOYEE RELATIONSHIP UNDER THE SCOPE OF THAT COLLECTIVE BARGAINING AGREEMENT.

We are faced in this matter with an unusual problem that there is a disclosed collective bargaining agreement consisting of the writings set forth in the complaint starting with the Master Agreement for Clerks, etc. of 1952 (Ex. 1 in evidence).

We are then faced with the problem that there is contended to be some kind of understandings not yet reduced to writing that constitutes this agreement varying and changing this particular contract. This best appears from Ex. 3, the deposition of Mr. Paul St. Sure, former president of the defendant PMA. In this it is contended that some kind of agreements varying these writings have been determined upon but not their wording and not yet reduced to writing. It is also contended that there are certain practices that vary, alter and amend this disclosed writing. It is also contended that the tail wags the dog by the various committees existing under the collective bargaining agreement in fact change this agreement by their minutes or even by their intentions and understandings. Indeed even awards of arbitration are not final but subject to agreements to change not yet reduced to writing.

We then have this negotiated contract reduced to writing and executed as Ex. 2 in August 1965. The question then is, which agreement is applicable?

Congress in the Landrum Griffith Act, Section 104 (29 U.S.C.A. 414) passed a wholesome and necessary law permitting any employee to determine the terms of a collective bargaining agreement by inspection of the written documents. This Act of Congress would be wholly defeated

and meaningless if it were proper to show an employee under this act a contract, and then to permit the union and the employer to contend that this is not the contract, but it is materially changed and altered by parol and secret agreement, or by waiver or conduct of the employer and the union or by other breaches of the contract. Section 104 was enacted by Congress to correct a vicious practice of the union and the employer having secret agreements very disadvantageous to the workingman. When differences arose, the workingman was faced with secret agreements. The purpose of Congress was to permit the employee to learn the full terms of the collective bargaining agreement under which he was employed. To permit secret or oral understandings or modifications as contended by the defendants and upon which the trial court purportedly acted, is to make the Act of Congress meaningless, and to defeat its very purpose.

The National Labor Relations Act section defining unfair labor practices requires the reduction to writing of any agreement when demanded by either party. We have in the case at bar in Ex. 1, an express provision that that writing can be changed only by a subsequent writing. We believe this is a sufficient demand under this statute to require any changes to be reduced to writing.

It is the known and disclosed collective bargaining agreement that is implied into the term of every master and servant relationship of every ship clerk in the Port of San Francisco when the clerk reports and commences his employment. It is not the oral understandings, practices or modifications from breaches that is implied into this contract of employment. It is the written and disclosed collective bargaining agreement that is final and conclusive between all parties. To hold otherwise, would result in chaos.

Mr. St. Sure testified in his deposition/as to whether a person employed by the American President Line on a dispatch as a clerk and how he would be paid. Mr. St. Sure testified ordinarily he would not be employed by the steamship company. He would be employed by a stevedore or a terminal operator. It is obvious therefore that not the shipper or the shipping line or the steamship company employs the clerk, but a stevedoring company or a terminal company employs those dispatched by the hiring halls and paid through PMA. This is very enlightening as to what is the actual position of PMA. PMA, the Pacific Maritime Employers Association, exists solely to represent employers employing longshoremen, clerks, and the related classifications. As such, it is grist to this defendant's mill to keep the waterfront in constant labor turmoil, for then they can justify their existence, the large number of employees and the extensive charges for services provided the employers. No person, not even Harry Bridges, could be responsible for the turmoil and chaos that has existed on the waterfront in this matter but it must be aided and abated by the employers. This is just what has happened and it is done by not having a definite and exact written contract which the courts and Congress have deemed necessary for the proper functioning of and peace in the master and servant relationship in such industries.

We therefore see that there are not exact rules by which the employer and the employee and the employer's associations or unions may live, but vague and indefinite understandings and not written or reduced to writing. We see practices which are claimed to be in accordance with some vague contract but not appearing in any document but in contravention of those documents. The result is inevitable chaos on the waterfront and in the maritime industry in and around the Port of San Francisco.

The evidence in the record and the contentions in this case clearly point out this problem.

We believe that it clearly presented in this case that the collective bargaining agreement is wholly the writings that were disclosed at the time and only those writings. The practices, customs and understandings not yet reduced to writing and signed, are obviously no part of the collective bargaining agreement. The contract is not a living breathing thing that snorts, rears and balks according to the particular occasion and the interest of the particular employers' association or of the particular union, under the particular circumstances, for that is chaos.

Plaintiff's counsel in this case, is counsel in the Federal Court case of Alexander, et al. vs. PMA, et al., which has been before this court twice, once reported in 314 Fed.2d 690, and this court's case No. 18,324. It came before this court a second time and is reported in 332 Fed.2d 266 (Certiorari denied 379 U.S. 882) and this is case in this court No. 18,913.

In this case, the testimony of the defendant and their members and officials are clear beyond all questions. Those who are members of the union are known as "book men", and have the designation of "registered". Those who are not admitted into the union, and they are almost as numerous as those who are "book men" are called nonregistered or "social security men". A different rule applies to each:

1. The "book man" is entitled to be dispatched to a job for its duration and in preferance to all others. The non-union man must be dispatched for only one day, and only after all union men have been dispatched.

2. The earnings of a "book man" are far greater than those of the non-union men who get only the left over crumbs and who are not paid at the same rate and who are not granted the fringe benefits of the Kaiser

Plan for themselves and their family, or the retirement benefits or the mechanization fund (the mulitmillion dollar fund) nor do they have any of the other fringe benefits including vacation pay.

3. This case vividly points up the fact that a separate procedure for disciplining is applied to the union member than to the non-union man such as Law. Even the current contract, Ex. 2, provides for different and more harsh punishment for the non-union man.

4. The union man votes for and elects the dispatcher who selects he jobs and dispatches the men from the hiring hall. The non-union man has no such standing. The union man elects the representatives who sit on the Port Committee but the non-union man has no such vote or selection. The results are quite obvious. There would not be action of this defendant Port Committee and thus mere failure to act by the union would have left Law without any punishment, and with the employers would have been required to take it to arbitration or the Coast Committee if they deemed such a step proper.

The history on the waterfront is well documented in the reported decisions. Prior to 1952 there was a collective bargaining agreement which provided that there should be preference of employment and registration for union members by express provision in the contract. This was adjudicated illegal and void in the proceedings involving the defendant ILWU and the defendant Local in two administrative agency decisions reported in 90 NLRB 1021 and 89 NLRB 284, and by this court, the U.S. Court of Appeals, Ninth Circuit, in 211 Fed.2d 946, for the specific reason of this preference of employment to and registration of union members. This very point that was adjudicated illegal and void was carried over and blanketed into and made a part of Ex. 1 in evidence,

the Master Agreement of 4 April 1952 by the provision that it gave preference of employment and dispatch to those who were registered on June 1, 1951, under that illegal and void contract. (See page 2, Ex. 1, Sec. 3 - "Preference of Employment" subdivision a). Page 14 of Ex. 1, Sec. 14 "Registration" subdivision (a) provides:

"All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration list as may be necessary to meet the needs of the port."

The record in this case shows by the testimony of the defendants' own witnesses that this means "book men" as distinguished from those such as Law who are not union men and are sometimes referred to as "social security men" (which arises from the employment records of the employee not bearing a registration number but the employee's social security number).

The same practice condemned and found illegal by the administrative agency and by this court has thus not only been carried over but is carried into effect by use of the designation of "registration".

The law is now well settled by Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, that the statutory exclusive bargaining representative owes a duty to all employees, whether union or non-union, to treat all of them equally, and to discharge this duty not in a dislatory way, but faithfully and impartially, and for failure to do this, that there is a liability.

The Vaca v. Sipes case, 386 U.S. 171, directly holds that this statutory collective bargaining agent is the exclusive representative of the employee in all grievance matters and that a failure to perform this statutory duty is an unfair labor practice, nevertheless this is not pre-empted and to thus prevent the courts from administering or hearing

these matters involving unfair actions of the statutory collective bargaining agent. This Vaca case also held that where a matter had been carried through four steps on a grievance by an employee, that the union collective bargaining agent was not required to take a fifth step involving extensive costs and procedures on arbitration initiated by and carried on for the employee if there was reason to believe it was not a meritorious matter. On the other hand, in the case at bar, we have the initial proceedings of a grievance by the employer in which the defendant ILWU delegated its authority to another entity and this other entity's president and other committee members did not even make a prima facie effort to learn the facts nor did they even understand the factual matter, but spent a possible five minutes and a maximum of fifteen minutes with Mr. Law. This group then assured Mr. Law that they would protect him, and then proceeded to do the very opposite.

In the case at bar, Mr. Law when he left the committee was led to believe that the various members of this union committee intended to and would not only represent him but protect him on all proceedings by the employer upon the employer's complaint. This is certainly not discrimination in any sense of the term. Even when the minutes, the exhibit in evidence, of the defendant Port Committee had become known, there was no contention or showing that there was anything but a unilateral action by the employers when the specific contract requires the action to be by both the employers and the employee members. It therefore appeared upon its face not only that there was a breach of the contract providing for a step in a grievance procedure in which there was neither notice nor charges nor an opportunity to appear and defend, but also an act unilaterally done by the employers in violation of the contract and barring Law from

his livelihood, by refusing him further dispatch. A trial in absentia is obviously no part of any grievance procedure under any possible theory. Law then sought to avail himself of the grievance arbitration procedure, both by the disclosed writings then in existence and by the claimed practices and alleged secret oral understandings between the defendants. The effort and the response did not bring any contention other than that he was no longer to be dispatched and that none of the various levels of the grievance procedure would hear his matter either as to his dispatch or as to his wage dispute. Certainly there was no contention that he was properly notified or that he had an opportunity to appear or defend himself or indeed that any person or entity other than the defendant ILWU who had not theretofore had any part of the proceedings, was the exclusive collective statutory bargaining agent and the contention that under a section of the NLRB he had a right to talk to his accuser, a corporation, the defendant Matson Terminals. It should be pointed out that is only one of some hundred employers of ship clerks in the Port of San Francisco and who had no power to dispatch him from the hiring hall or indeed to use his services without a dispatch under the contract as disclosed.

We should point out that under the disclosed contract, Ex. 1, the registration was confined solely to "book members" and synonymous with that. We should point out that under the disclosed contract a registration can only be given with the mutual consent of the employers association and the union, and the union has throughout refused to give its consent to this registration without the employee being a "full book" man of the union, Local 34, and the ILWU and then only to a portion of the group required to fill these jobs. This matter has been raised collaterally when the NLRB has been asked to hold an election to certify a statutory collective

bargaining representative as in Phoenix Tin Ware Co. , Inc. (1952) 100 NLRB 528, where the contract provided that no tinsmith, welder, etc. should be employed unless "recognized by the union". In the Phoenix Tin Ware case, the NLRB held that since "recognition" was not defined in the contract, and gave the union a veto on employment of any employee, this provision in the contract was invalid, so the Board could not hold an election for want of a valid bargaining agreement. The Phoenix case, 100 NLRB 528, turns on and follows Newton Investigation Bureau, (1951) 93 NLRB 157, also a decision involving the question as to whether there should be an employee election called. This in turn required a determination as to whether there was a valid collective bargaining agreement, as the agreement in effect had a clause that when the employer filled a vacancy or created a new position, he could choose his own employees, "however, such person employed are satisfactory to both parties to this agreement". No limit was placed on the grounds of the union's discretion. The decision held that this contract provision as to requiring union approval for hiring was beyond the intent of the union security provisions of Section 8 (a) (3) of the Act. Obviously, then the provisions as to registration in the Master Agreement 1952 (Ex. 1) is to be measured by the same test and will fall by the same provision.

CONCLUSIONS

1. Law was tried and convicted in absentia, without proper notice and without an opportunity to appear and defend himself. It appears from the record to be a unilateral action of the employers. Consequently, on either score it is a violation of the contract. If the new contract, Ex. 2, is applicable, any punishment of forever barring him from employment is obviously in violation of that contract.

2. The plaintiff Law was lead to believe by the Committee of the defendant members of Local 34 that he was not to be disciplined, particularly in a proceedings where it required joint action of both the employers and of these union employees. The action of Herman confessing him guilty and in the other members sitting by and acquiesing in their silence, and acquiesing in the punishment is obviously in violation of the contract and is clearly a violation of duty if these persons could have been delegated power by the exclusive collective bargaining representative, the defendant ILWU.

3. The contract is the known and disclosed contract. It is not some ideas not yet reduced to writing and signed. It is not customs and practices, and it is not violations of the disclosed written contract. Only the valid portions of the written contract are the true collective bargaining agreement. It cannot include the illegal portions in violation of law.

4. The evidence shows that there is two rules to apply, one to union members accused by an employer, and the other to non-union employees such as Law. There are separate procedures and separate penalties. As such, it is clearly a violation of law.

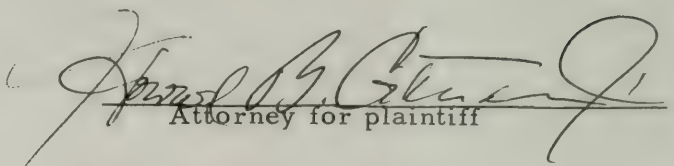
5. The employee Law was entitled to more than desolatory and faithless representative in the first and initial stage of the grievance procedure in the complaint by the employer against him. The statutory exclusive bargaining representative, the defendant ILWU, could not delegate its matters of judgment, discretion and skill to the entity Local 34 and effort to do so is clearly contrary to law.

6. The plaintiff Law is entitled to follow his lawful occupation that he has followed for 9-1/2 years. The conviction in absentia must

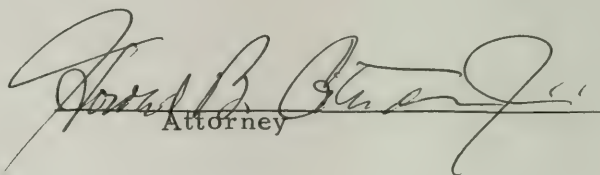
be annulled and the plaintiff granted his damages.

Justice requires that this judgment be reversed.

June 10, 1968.


Attorney for plaintiff

I certify that, in connection with the preparation of this brief,
I have examined Rules 18 and 19^{39 & 40} of the United States Court of Appeals
for the Ninth Circuit, and that, in my opinion, the foregoing brief is in
full compliance with those rules.


Attorney

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No. 22506

In the

United States Court of Appeals

For the Ninth Circuit

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association, PACIFIC MARITIME ASSOCIATION, an unincorporated association, ILWU, an unincorporated labor union, ILWU, LOCAL 34, an unincorporated labor union, MATSON TERMINALS INC., a California corporation,

Appellees.

**Brief of Pacific Maritime Association,
other employer appellees,**

**International Longshoremen's and Warehousemen's
Union and other union appellees**

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Appellees.

**Brief of Pacific Maritime Association,
other employer appellees,**

**International Longshoremen's and Warehousemen's
Union and other union appellees**

STATEMENT OF ISSUES

1. Is the employer's right to discharge an employe subject to any substantive limitations other than those set out in the collective bargaining contract and the National Labor Relations Act?
2. Does the law impose any regulations on the handling of a grievance by the exclusive collective bargaining representative, except those imposed by the National Labor Relations Act (including the duty of fair representation) and the collective bargaining contract?

3. Does the law impose any procedural regulations, such as the doctrine and rules of Constitutional *due process*, on the conduct of the joint union-employer committee acting in the grievance-arbitration machinery?

4. Can an employe obtain any relief in an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to set aside a final decision in the grievance-arbitration machinery of the collective bargaining contract, where the employe fails to show a breach of the duty of fair representation in the handling of the grievance leading to his discharge?

STATEMENT OF THE CASE

Prior to November of 1964, Russell Law worked from time to time as a casual ship clerk to perform extra ship clerk work (F.9).¹ This is work that is sometimes available when the regular permanent registered work force can not handle peaks in the work load (F.8). On November 23, 1964, Law worked for Matson Terminals, Inc. checking cargo being loaded on the S.S. *Dant*. On that date, he did his work so carelessly that the wrong cargo was loaded by the longshoremen who were doing their work in accordance with instructions Law relayed to them (F.11). The one and one-half hours time lost by this group of longshoremen during which the mistake was corrected, represented considerable and unnecessary expense (F.12).

As a result, Matson Terminals, Inc. filed a complaint against Law. (F.14). This complaint was filed pursuant to the grievance procedure of the collective bargaining contract between Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union. The first step of that procedure is investigation and adjudication of the complaint by the Joint Port Labor Relations Committee. Prior to consideration of the complaint in the

1. The facts of this case are set out in the district court's detailed findings of fact which along with the court's conclusions of law are reprinted in the Appendix to this brief. Finding of fact is abbreviated by F. and conclusion of law is abbreviated by C.

grievance procedure, the union members of the joint committee discussed the matter with Law (F.18). He admitted to them that he had caused the wrong cargo to be loaded aboard the *S.S. Dant*. They told him that they would represent him as best they could (F.18e).

The Committee considered the complaint that afternoon, January 13, 1965 (F.21). The employers asserted that Law had failed to do his work properly. The union presented the factual material Law had given them. The Committee then decided the case. As is customary in the case of such negligent performance of work by nonregistered or casual clerks, the Committee denied Law further dispatch privileges (F.33). Based on their experience, the union representatives felt that they would have lost if they had attempted to take this decision to arbitration. (R.T. 111, 165-166)

The decision of the Committee exhausted the contractual grievance procedure except for claims that might be asserted under § 13 which provides:

“There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or non-membership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs.”

Law has expressly denied that he is asserting any violation of § 13 (F.36, 37; cf. Op. Br. p.55). The contract provides, accordingly, that the decision here involved is final and binding. On findings so stating (F.13, 15, 16, 26), the trial court so concluded (C. 8, 9).

Law filed his complaint in district court. After trial on the merits, the district court made its findings and conclusions as to, *inter alia*, the duty of fair representation. The union at all times acted “with honesty, fairness and impartiality” in handling the Law grievance (F.3, 7, 31). It “fairly, fully and accurately represented Law’s interest at all times (F.28). It took all of its

actions regarding Law "in good faith and without any malice toward, or prejudice" against him (F.29) and presented the facts of the dispute "completely and accurately to the [Joint] Committee" (F.30., see also F.21). Law "was not the subject of any invidious or hostile discrimination" by any of the defendants (F.32). The district court concluded, on its findings, that there was "no violation of any duty of fair representation" owing to Law (C. 4, 5 and also c. 6, 7, 9) and that there was no violation of the contract (C. 2, 3). Thereafter the court entered judgment in favor of defendants (C.T. 359).

ARGUMENT

1. **There is no basis for setting aside the trial court's findings that there has been no breach of the duty of fair representation.**

Rule 52(a) of the Federal Rules of Civil Procedure provides in part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Acceptance of this rule is so well settled that lengthy citation is not necessary. Some examples are: *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Reliance National Life Insurance Company v. Hackelman*, 372 F.2d 133 (9th Cir., 1967); and *Snider v. England*, 374 F.2d 717 (9th Cir., 1967). In a recent case, this Court stated the rule as follows (*Santa Anita Mfg. v. Lugash*, 369 F.2d 964 (9th Cir., 1966)):

"At the outset we must consider the dimension of our function as a reviewing court. We are not a trial court and will not weigh the evidence de novo to arrive at new find-

ings. Our power is limited to performing the function assigned to us by Rule 52(a) of the Federal Rules of Civil Procedure. Only if the findings of the court below are clearly erroneous can we set them aside.”

Law’s brief is an attempt to have this court consider the evidence *de novo*. His lengthy statement of facts is a summary of the evidence from his point of view, with references only to the transcript of the trial in the court below. He has ignored the court’s findings of fact. He has utterly failed to meet his appellant’s burden of showing that the findings of fact are “completely erroneous”. There is ample evidence in the record to support the district court’s findings of fact and particularly those related to the duty of fair representation (F. 27-32). They accordingly are binding in this Court. They fully support the conclusion (C. 4-9) that there was no breach of the duty of fair representation.

2. For an individual employee to prevail on a § 301 claim of violation of a collective bargaining contract, he must first prove that his union breached the duty of fair representation in processing his grievance.

The present case is controlled almost precisely by the principles of law in *Vaca v. Sipes*, 386 U. S. 171 (1967). In that case, an employe sued his union alleging that he had been discharged from his employment in violation of the collective bargaining contract between his employer and the union, and that the union had arbitrarily refused to take his grievance to arbitration. The Supreme Court agreed that the employe had stated a claim upon which relief could be granted, stating (386 U.S. at 185):

“... [A] situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union’s *wrongful* refusal to process the grievance.” (Emphasis in the original.)

The Supreme Court then referred to the award of the jury that the grievance had merit and should have resulted in a favorable decision. The Court stated (386 U.S. at 193):

"Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must have also proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance."

The court below applied these *Vaca* principles.

The principal issue before the district court was the same as the one the Supreme Court confronted in *Humphrey v. Moore*, 375 U.S. 335 (1964). The Supreme Court held that a final decision in the grievance-arbitration procedure will not be set aside by a court in the absence of a showing that the decision was obtained by improper conduct of the union in breach of its duty of fair representation. Such a showing must be further supported by establishing a violation of the collective bargaining contract before any effective relief can be provided.

Humphrey v. Moore, *supra*, involved two companies ("E & L" and "Dealers") that had operated in the same geographic area. They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employes of the two employers as to who should be laid-off and who should continue to work.

The employes of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employes' seniority rights. E & L was the older company, and its employes generally had greater seniority than those at Dealers; any

dovetailing of the seniority lists would mean a displacement of many of Dealers' employees. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employees (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an order retaining Dealers' employees in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employees that they had nothing to worry about and had thus lulled them into a false sense of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers' employees. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employees were deprived of a Joint Conference Committee

hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employees by indicating that the union would support their cause in the grievance procedure. There were allegations of a violation of § 5 of the contract. The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in these circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was *in breach of his right to and its duty of fair representation*. Therefore, the Court concluded, Moore

had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.

Humphrey states that a breach of the duty of fair representation by the union in the conduct of the grievance-arbitration machinery will allow the court to review a grievance-arbitration decision which the contract provides is final and binding. *Vaca* clarifies this ruling by holding that in the absence of proof of breach of the duty of fair representation, such grievance-arbitration action is final and binding. It adds that the proof of the contract violation does not establish a breach of the duty.

The substantive law applicable in § 301 contract violation cases is established by the opinions referred to above. A breach of the duty of fair representation must be shown. The findings in this case, that such breach was not shown, cannot be set aside. Unless the § 301 law is not applicable, the judgment below must necessarily be affirmed.

3. The governing law in this case is the federal common law of labor relations which is fashioned by the courts in § 301 cases.

Russell Law makes a number of arguments based upon the proposition that legal principles developed in other fields of the law should be binding in matters of labor relations even if they are disruptive to the ordinary course of collective bargaining. This proposition has repeatedly been denied by the Supreme Court. It is recognized that in § 301 cases the courts will apply the substantive federal law and that that is the federal "common law in this area of labor relations". See *Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 and 514 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

Law contends that the decision of the Joint Port Labor Relations Committee should be set aside because the acts of the collective bargaining agent in determining who would participate on the union side of the Committee were not individually confirmed by him. He relies on a statement in a *Corpus Juris*. 685, Agency, § 342 (Op. Br. 48). This statement asserts that, when a principal delegates a power to an agent, that agent may not delegate it to someone else without approval of the principal. This is used to attack the provision of the collective bargaining agreement prescribing the personnel of the Joint Port Labor Relations Committee. Whether the applicable contract be the 1952 master agreement, or any one of the subsequent documents, the contractual provision establishing a Joint Port Labor Relations Committee is the same. It provides:

"Each of said labor relations committees shall be comprised of three or more representatives designated by the Union and three or more representatives designated by the Employers."

Russell Law is represented by whomever the union designated as the members of the committee. It would be completely destructive of collective bargaining if each person in the collective bargaining unit had to ratify the designation by the union of the persons on each of the committees in order to permit the committee to act.²

Russell Law asks this Court to find, notwithstanding the findings of the court below, that the decision in the grievance-arbitration procedure was illegal because he did not have knowledge of the charges against him or notice of the hearing or an opportunity to appear and to defend himself. The district court has made findings

2. The individual employee gains many advantages from having the collective bargaining representative. In exchange, as part of the bargain that is imposed by the National Labor Relations Act, 29 U.S.C. § § 151, *et seq.*, the individual gives up the right to make his own contract and is bound by the contract made by the representative. The individual in the bargaining unit is not a principal who individually controls the actions of the representative. See *J. I. Case Company v. Labor Board*, 321 U.S. 332 (1944).

of fact (App. 4) that Law did have knowledge of the charges and notice of the hearing and an opportunity to appear and explain his position to the union representatives on the Committee. It is true, however, that he did not appear on his own behalf at the joint committee and that the explanation that he presented to his union representatives was presented by them before the full committee. Nowhere, however, has Law cited authority—either statutory or judicial—that supports his right to appear personally before the grievance committee or otherwise to receive notices and be treated independently of his bargaining representative. Nor has Law shown that failure to accord him these rights amounted to a breach of the duty of fair representation.

The fact that Law was not present at the Joint Committee's meeting did not amount to a breach of the duty of fair representation. Law had previously met with the union representatives on the committee. He had had the charges read to him. He said he understood the charges and that they were true. He offered in explanation various extenuating circumstances. His union representatives told him that they would do as best they could before the committee. In the full Joint Committee meeting, the union representatives presented Law's position faithfully as he had reported it to them (R. T. 31-32, 48-50, 60-67). There is nothing in the record to indicate otherwise. The findings are clear (See App. 5-6).

The employer representatives refused to accept Law's extenuating circumstances as a basis for making an exception to the usual decision on similar cases. Faced with an adamant position on the part of the employers and based on their knowledge as experienced labor representatives that they could not win an arbitration the union representatives agreed that Law would have to be barred from future dispatches (R. T. 110-111). There is no showing of hostile discrimination toward Law or lack of good faith on the part of his union representatives. The findings are clear (App. 6).

In regard to Law's claims of insufficiency of notice of the hearing, he has again failed to make out a case of breach of the duty of fair representation. It is true that a written notice of the committee meeting, which was mailed to him in advance of the date set for the meeting, did not reach him because he had moved and had not given the union his new address. However, Law received oral notice of the afternoon Committee meeting during the morning. Most significant, he did, in fact, meet that morning with his union representatives. At that time they asked him whether he wanted a delay in the Committee meeting since he had not received the earlier letter. He declined this offer (R. T. 95, 107, 136). There is nothing in the record even suggesting hostile discrimination against Law or any bad faith in handling his case. The findings and conclusions of the court below that there was no arbitrary discriminatory or bad faith conduct on the part of the union (App. 6) should be sustained.

The federal common law as to judicial consideration of final decisions in the grievance-arbitration procedure of collective bargaining contracts is established. In general the courts will not review the merits of a decision that the contract says is final and binding because it is a decision by joint action of the employer and the union or because it is an arbitration award. *General Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963). This principle governs § 301 actions unless the collective bargaining representative's conduct of the grievance-arbitration procedure is in breach of the representative's duty of fair representation. When the court has been shown that such conduct has taken place, it will then determine whether or not there has been a violation of the collective bargaining contract by the grievance-arbitration decision. See the discussion, above, of *Humphrey v. Moore*, 375 U.S. 335 (1964) and *Vaca v. Sipes*, 386 U.S. 171 (1967).

Russell Law finally contends that the doctrine of due process, which the Constitution applies to federal and state actions, also is governing in matters of labor relations (Op. Br. 35). The

failure to supply any citations in support of this proposition is to be expected. This is again an effort to avoid the ordinary application of the labor relations law under § 301.

Here, Law relies on the collective bargaining contract as a limitation on the employer's otherwise unrestricted power to discharge him at will. To enforce this substantive provision of the contract, he is obliged to use the contract's agreed upon procedure for enforcement. The bargain is for use of the grievance-arbitration procedure; Law is bound by this bargain. The bargain does not provide for the application of Constitutional *due process* rules or doctrines to the procedures of the grievance-arbitration committees.

Russell Law must look beyond the contract, to the general law, for limitations on actions of any members of the joint Committee. The only limitation is the duty of fair representation that is applicable in § 301 suits. It applies to the union members of the committee. It arises out of the peculiar status that federal law gives to the exclusive representative for collective bargaining. The duty is "derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes". See *Humphrey v. Moore*, 375 U.S. 335, 356 (1964).

The duty of fair representation, applicable to the union members of the grievance committee, does not make the rules and doctrines of Constitutional *due process* applicable to the joint committee's procedures. Were this proposition not obviously correct, the nature of labor relations would explain its validity. The grievance-arbitration procedure is voluntarily accepted by the employer and the employes, acting through their exclusive bargaining representative. The process provides a "substitute for industrial strife" and is "part and parcel of the collective bargaining process itself". See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The grievance committee provides a proper place for the settlement of grievances.

"... [A] union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

"... [T]he union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device. . . .

* * *

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." See *Vaca v. Sipes*, 386 U.S. 171, 192-194 (1967).

The underlying principle had earlier been stated in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953). The bargaining representative's spokesmen may exercise "a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented". This principle was re-stated in *Humphrey v. Moore*, 375 U.S. 335, 349 (1964):

"[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . [A] union must be free to sift out wholly frivolous grievances which would only clog the grievance process. . . ."

The application of this principle to a situation like that now before this Court was more fully stated in the concurring opinion of Mr. Justice Douglas, who said, 375 U. S. at 358-359:

"[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well

adapted to the collective bargaining process. Of course, we must protect the rights of the individual. It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties. Similarly, in safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. *Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life.*" (The emphasis is added.)

The district court, following the lead of the *Humphrey* decision, properly held that Russell Law could not prevail in this law suit under § 301 because he did not establish a breach of the duty of fair representation.

There have been other attempts to apply general law that is at variance with labor relations law in § 301 suits. An argument was made before the Supreme Court that cases arising under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, would set forth the law applicable in a § 301 suit with respect to either enforcement or setting aside an arbitration award. The court rejected this proposition in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The court states at 578:

"Thus the run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427, [98 L.ed. 168, 74 S.Ct. 182,] becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with estab-

lished procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." (363 U.S. 574 at 578.)

The cases we have cited establish that the § 301 substantive law governs in a case like the one presented on this appeal. True, the courts are called upon to fashion that law on a case by case basis. However, it is clearly error to apply principles of the general law that are not harmonious to the national labor policy. Law's contentions as to what is the § 301 law must be rejected.

4. Law raises issues that are within the exclusive jurisdiction of the National Labor Relations Board.

In Section III of his opening brief, Law asserts claims of violations of the National Labor Relations Act. Excerpts from his brief in which these claims are stated are re-printed in the Appendix hereto. These claims are within the exclusive jurisdiction of the National Labor Relations Board.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. The statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door*, 359 U.S. 354 (1959); *Marine*

Engineers Beneficial Association v. Interlake S.S. Co., 370 U.S. 173, 174, 176-177 (1962); *International Association of Bridge, etc. Workers v. Perko*, 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome*, 377 U.S. 126, 127 (1964).

The Supreme Court in *San Diego Building Trades Council v. Garmon*, supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Union*, 346 U.S. 485, 490-491 (1953), on the role of the Labor Board in administering the National Labor Relations Act:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ."

The federal courts do not provide remedies for claims that arguably assert unfair labor practices.

CONCLUSION

Russell Law seeks reversal of the judgment of the district court. That judgment was entered after trial on the merits and is supported by findings of fact and conclusions of law. Law has not directly attacked the findings of fact; he has not shown that they

are "clearly erroneous". The district court applied the federal common law in the area of labor relations that courts have fashioned under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. It properly rejected Law's claims of procedural rights in the processing of his grievance.

We respectfully ask that the judgment of the district court be affirmed.

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August 15, 1968

Appendix

Original filed Oct 31 1967

Clerk, U.S. Dist. Court, San Francisco

*In the United States District Court for the
Northern District of California*

No. 43719

RUSSELL O. LAW,

Plaintiff,

vs.

JOINT CHECKER LABOR RELATIONS COMMIT-
TEE, SAN FRANCISCO, an unincorporated as-
sociation, PACIFIC MARITIME ASSOCIATION,
an unincorporated association, ILWU, an
unincorporated labor union, ILWU, LOCAL
34, an unincorporated labor union, MATSON
TERMINALS INC., a California corporation,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial and the Court, having duly considered the evidence and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

1. Defendant Pacific Maritime Association (hereinafter referred to as "PMA") is a duly organized and existing California nonprofit corporation with a usual place of business at San Francisco, California. PMA represents its member steamship, stevedoring and terminal companies for the purpose of negotiating and administering collective bargaining contracts with unions, representing employes of its member companies. The companies so represented by PMA are engaged in commerce as defined in the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 142; see 29 U.S.C. § 152(6).

2. Defendant International Longshoremen's and Warehousemen's Union (hereinafter referred to as "ILWU") is a duly organized and existing unincorporated labor organization within the meaning of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 142; see 29 U.S.C. § 152(5). The ILWU is the exclusive collective bargaining representative of longshoremen and ship clerks employed by PMA in Pacific Coast ports, including, inter alia, San Francisco and Oakland, California.

3. Defendant ILWU, Local 34 (hereinafter referred to as "Local 34") is one of several member locals of defendant ILWU. Local 34 is located in San Francisco, California, and its members include individuals employed as ship clerks in San Francisco and Oakland.

4. Defendant Matson Terminals, Inc. (hereinafter referred to as "Matson") is a California corporation engaged in the stevedoring industry on the Pacific Coast and is a member of PMA. Ship clerks are employed by defendant Matson in, inter alia, San Francisco and Oakland.

5. Defendant Joint Checker Labor Relations Committee, San Francisco (hereinafter referred to as the "Committee") is an unincorporated committee established and existing pursuant to the terms of a collective bargaining contract between defendant PMA, on behalf of its members, and defendant ILWU, on behalf of itself and on behalf of each of its ship clerk local unions (hereafter the Agreement). The membership of the Committee consists of representatives of defendant PMA and of defendant ILWU.

6. Under the terms of the Agreement, the Committee maintains and operates joint dispatching halls in, inter alia, Oakland for the dispatching of ship clerks to perform work for employer members of defendant PMA.

7. Under the terms of the Agreement, the Committee investigates and adjudicates complaints against ship clerks by employers.

8. Ship clerks working under the Agreement are in one of three categories: they are fully registered (Class A) ship clerks, or ship clerks with limited (Class B) registration, or casual ("social security") ship clerks having no registered status. First preference in employment and dispatch is given to Class A ship clerks who are available for employment. Second preference in employment and dispatch is given to Class B ship clerks who are available for employment. Casual ship clerks are not dispatched from the dispatching hall or employed while there is any registered ship clerk qualified, ready and willing to do the work.

9. For some time prior to January 13, 1965, plaintiff Russell O. Law worked as a casual ship clerk in San Francisco on a day-by-day basis.

10. Shortly before 7:30 a.m. on November 23, 1964, plaintiff Law arrived at the dispatch hall in Oakland and was dispatched shortly thereafter to work for defendant Matson as a hatch clerk on the S.S. DANT.

11. On November 23, 1964, plaintiff Law, while so employed by defendant Matson as a hatch clerk, allowed certain cargo destined for Yokosuka, Japan, to be loaded with cargo on the S.S. DANT, which was destined for Subic Bay in the Philippine Islands.

12. Plaintiff's error, as described in Finding 11, resulted in one and one-half hour's lost time for the ship gang and represented expense to defendant Matson that was unnecessary and that was considerable in amount.

13. The Agreement at all relevant times required that complaints be processed in accordance with the grievance-arbitration procedure set forth therein. In the San Francisco area (including Oakland) if a dispute arising on the job is not settled on the job it is referred to the Committee. If the employer's representation on the Committee and the union's representation on the Committee disagree on any question before the Committee, either

the employers or the union may refer the question to the next procedural step in the grievance-arbitration machinery. Agreement by the parties at the level of the Joint Checker Labor Relations Committee, however, is a final and binding determination of any dispute arising on the job.

14. Defendant Matson, in accordance with the terms of the Agreement, lodged a complaint against plaintiff with defendant Committee charging that plaintiff was negligent in his work while employed by defendant Matson on November 23, 1964.

15. The complaint by Matson related to a dispute arising on the job.

16. Plaintiff at no time effectively claimed that the dispute was anything except a dispute arising on the job.

17. Defendant Committee determined to consider the Matson complaint against plaintiff at a meeting on January 13, 1965. A notice of the meeting was mailed to plaintiff by defendant Local 34, but it was not received by plaintiff as he had changed his residence.

18. Plaintiff Law was given verbal notice of the said meeting on the morning of January 13, 1965, and on the said morning plaintiff met with union representatives serving on defendant Committee. At the said meeting:

(a) The complaint of defendant Matson against plaintiff was read to plaintiff;

(b) Plaintiff heard the contents of the said complaint;

(c) Plaintiff understood the contents of the said complaint;

(d) Plaintiff admitted that the allegations of the complaint were factually correct;

(e) The union representatives told plaintiff that they would represent him as best they could before the Committee;

(f) The union representatives told plaintiff that they had sufficient time to present his side of the case and that they needed no more time to do so.

19. The evidence, including the oral testimony, presented by defendants with respect to Finding 18, and its sub-findings, was credible, plausible and direct and was entitled to be credited by the trier of fact, and was credited by the trier of fact.

20. The evidence, including the oral testimony, presented by plaintiff with respect to Finding 18, and its sub-findings, was not credible, was not plausible and was not direct, and was not entitled to be credited by the trier of fact, and was not credited by the trier of fact.

21. The Committee met on the afternoon of January 13, 1965, and union representatives of the Committee presented to the Committee the factual information that plaintiff Law had given at the meeting referred to in Finding 17.

22. At their meeting on the afternoon of January 13, 1965, the Committee considered defendant Matson's complaint against plaintiff, determined that plaintiff had performed his work negligently while employed by defendant Matson on November 23, 1964, and on the basis of this determination the Committee ordered that plaintiff be denied further dispatch. In effect, this order meant that plaintiff was no longer eligible to work as a ship clerk in the San Francisco area.

23. The allegations made by defendant Matson in its complaint against plaintiff, based on the events of November 23, 1964, are true.

24. Plaintiff's testimony at the trial sufficiently supports the Court's finding that the allegations made by defendant Matson in its complaint are true.

25. Evidence, including oral testimony, presented by defendants sufficiently supports the Court's finding that the allegations made by defendant Matson in its complaint are true. Said evidence was credible, plausible and direct and was entitled to be credited by the trier of fact, and was credited by the trier of fact.

26. The determination of the Committee is now a final and binding determination in the grievance-arbitration procedure with respect to the matters alleged by plaintiff in his complaint herein; the Court has no basis, in fact, for setting aside or modifying that determination.

27. At all relevant times defendant ILWU and defendant Local 34 acted with honesty, fairness and impartiality in all matters related to the Matson complaint against plaintiff.

28. At all relevant times, defendant ILWU and defendant Local 34 fairly, fully and accurately represented plaintiff's interests with respect to all matters related to the Matson complaint against plaintiff and with respect to any and all rights of plaintiff under the Agreement.

29. All actions of the members of the Committee, with respect to the Matson complaint against plaintiff and with respect to any and all rights of plaintiff under the Agreement, were taken in good faith and without any malice toward, or prejudice against plaintiff.

30. Defendants ILWU and Local 34 presented plaintiff's side of the dispute completely and accurately to the Committee.

31. The Committee acted with honesty, fairness and impartiality in considering and acting upon the Matson complaint against plaintiff.

32. Plaintiff was not the subject of any invidious or hostile discrimination by any defendant herein.

33. The Committee issued its order denying plaintiff further dispatch as a ship clerk because of plaintiff's negligent performance of duties; the said order was consistent with the customary practice of the Committee in cases presenting identical or similar facts. Evidence, including oral testimony, presented by defendants to this effect was credible, plausible and direct and was entitled to be credited, and was credited, by the trier of fact.

34. The Committee by letter dated February 12, 1965, advised plaintiff and his attorney fully of the right of plaintiff to invoke grievance-arbitration procedures if plaintiff believed that § 13 of the basic collective bargaining contract document had been violated; a copy of the said § 13 was sent plaintiff and to his attorney.

35. Section 13 of the basic collective bargaining contract states:

“There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or non-membership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs.”

36. At no time has plaintiff effectively invoked the grievance procedures related to § 13.

37. Plaintiff's claim herein does not allege discrimination or violation of the said § 13.

CONCLUSIONS OF LAW

Whereupon, the Court concludes as a matter of law:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff, constituted no violation of plaintiff's rights under any provision of the Agreement or under any provision of any other contract.

3. The acts of defendants, or any of them, in all matters related to the conduct of grievance-arbitration procedures of the Agreement, constituted no violation of plaintiff's rights under any provision of the Agreement or under any provision of any other contract.

4. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff,

constituted no violation of any duty of fair representation owing to plaintiff by any defendant herein.

5. The acts of defendants, or any of them, in all matters related to the conduct of grievance-arbitration procedures of the Agreement, constituted no violation of any duty of fair representation owing to plaintiff by any defendant herein.

6. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff, constituted no violation of any statutory duty owing to plaintiff by any defendant herein.

7. The acts of defendants, or any of them, in all matters related to the conduct of the grievance-arbitration procedures of the Agreement, constituted no violation of any statutory duty owing to plaintiff by any defendant herein.

8. The determination of the Committee with respect to the complaint of defendant Matson against plaintiff is a final, binding and lawful decision of the collective bargaining grievance-arbitration process specified in the Agreement and is enforceable in the courts.

9. There is no basis in fact or in law for this Court, or any court, to set aside or modify the decision of the Committee with respect to the complaint of defendant Matson against plaintiff or with respect to plaintiff's rights under the Agreement or with respect to any matters that are the subject of the said determination.

10. Plaintiff has not presented sufficient evidence to sustain his burden of proof as to his purported claims presented in his complaint herein or in the pre-trial order herein.

11. Plaintiff is not entitled to any of the relief sought herein.

12. Defendants are entitled to judgment with costs.

Let judgment be entered accordingly.

Dated:

OLIVER J. CARTER

United States District Judge

Portions of Russell Law's brief claiming unfair labor practices.

The National Labor Relations Act section defining unfair labor practices requires the reduction to writing of any agreement when demanded by either party. We have in the case at bar in Ex. 1, an express provision that that writing can be changed only by a subsequent writing. We believe this is a sufficient demand under this statute to require any changes to be reduced to writing. (page 50).

* * *

The record in this case shows by the testimony of the defendants' own witnesses that this means "book men" as distinguished from those such as Law who are not union men and are sometimes referred to as "social security men" (which arises from the employment records of the employee not bearing a registration number but the employee's social security number).

The same practice condemned and found illegal by the administrative agency and by this court has thus not only been carried over but is carried into effect by use of the designation of "registration". (page 54)

* * *

Certainly there was no contention that he was properly notified or that he had an opportunity to appear or defend himself or indeed that any person or entity other than the defendant ILWU who had not theretofore had any part of the proceedings, was the exclusive collective statutory bargaining agent and the contention that under a section of the NLRB he had a right to talk to his accuser, a corporation, the defendant Matson Terminals. (page 56)

* * *

We should point out that under the disclosed contract, Ex. 1, the registration was confined solely to "book members" and synonymous with that. We should point out that under the disclosed contract a registration can only be given with the mutual consent of the employers association and the union, and the union has throughout refused to give its consent to this registration without the employee being a "full book" man of the union, Local 34, and the ILWU and then only to a portion of the group required to fill

these jobs. This matter has been raised collaterally when the NLRB has been asked to hold an election to certify a statutory collective bargaining representative as in *Phoenix Tin Ware Co., Inc.* (1952) 100 NLRB 528, where the contract provided that no tinsmith, welder, etc. should be employed unless "recognized by the union". In the *Phoenix Tin Ware case*, the NLRB held that since "recognition" was not defined in the contract, and gave the union a veto on employment of any employee, this provision in the contract was invalid, so the Board could not hold an election for want of a valid bargaining agreement. The *Phoenix case*, 100 NLRB 528, turns on and follows *Newton Investigation Bureau*, (1951) 93 NLRB 157, also a decision involving the question as to whether there should be an employee election called. This in turn required a determination as to whether there was a valid collective bargaining agreement, as the agreement in effect had a clause that when the employer filled a vacancy or created a new position, he could choose his own employees, "however, such person employed are satisfactory to both parties to this agreement". No limit was placed on the grounds of the union's discretion. The decision held that this contract provision as to requiring union approval for hiring was beyond the intent of the union security provisions of *Section 8 (a) (3)* of the Act. Obviously, then the provisions as to registration in the Master Agreement 1952 (Ex. 1) is to be measured by the same test and will fall by the same provision. (pages 56-57)

* * *

The evidence shows that there is two rules to apply, one to union members accused by an employer, and the other to non-union employees such as Law. There are separate procedures and separate penalties. As such, it is clearly a violation of law. (page 58)

